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No. 97-____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

GARY ELDON ALVORD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

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(Capital Case)

QUESTIONS PRESENTED FOR REVIEW

The questions presented by this petition are:

1. Can acknowledged Hitchcock error ever be deemed harmless in the absence of a state court evidentiary hearing where such error involves significant non-record mitigating facts never considered by a sentencing court?

2. Is the decision of the Florida Supreme Court below unconstitutionally arbitrary in failing to order an evidentiary hearing to consider proffered non-record mitigating evidence presented by petitioner after having granted such relief to similarly situated collateral review petitioners?

3. Is a harmless error analysis applicable where an acknowledged Hitchcock error and the existence of additional non-record mitigating facts is compounded by the sentencing court and jury having considered aggravating circumstances under constitutionally invalid instructions?

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Gary Eldon Alvord, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of Florida entered in this case on April 10, 1997.

OPINIONS BELOW

The opinion of the Supreme Court of Florida, 1 App. 1a-18a, is published at 694 So.2d 704. The orders below in this proceeding of the Circuit Court, Thirteenth Judicial Circuit, Hillsborough County, Florida, are unpublished and appear at 2 App. 415a-418a and 2 App. 453a-455a to this Petition. The trial judge's Findings of Fact in Support of the Death Penalty, 2 App. 456a-462a, are unpublished. Additional opinions and orders entered in prior proceedings in this case are reported at Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. denied, 428 U.S. 923 (1976); Alvord v. State, 396 So.2d 184 (Fla. 1981); Alvord v. Wainwright, 564 F.Supp. 459 (M.D. Fla. 1983); Alvord v. Wainwright, 725 F.2d 1282 (11th Cir.), cert. denied, 469 U.S. 956 (1984); Alvord v. State, 459 So.2d 316 (Fla. 1984); and Alvord v. Dugger, 541 So.2d 598 (Fla. 1989), cert. denied, 494 U.S. 1090 (1990), and appear at 1 App. 19a-230a and 2 App. 231a-345a to this Petition.

JURISDICTION

The order sought to be reviewed was entered on April 10, 1997. The Supreme Court of Florida denied petitioner's timely motion for rehearing on May 28, 1997,

2 App. 366a, and issued its mandate on June 27, 1997, 2 App. 367a. This petition is a corrected petition filed timely under Rule 14.5 following return of a previous submission on December 8, 1997. This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case requires interpretation and application of the Eighth and Fourteenth Amendments to the United States Constitution. The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. The Federal Questions Raised Below.

The federal questions sought to be reviewed in this petition challenging a death sentence involve undisputed

error under Hitchcock v. Dugger, 481 U.S. 393 (1987). The particular Hitchcock error at issue relates to evidence not presented at trial because state law precluded consideration of non-statutory mitigating circumstances. Petitioner's non-record mitigating evidence was proffered in the post-conviction proceedings below, but petitioner was denied an evidentiary hearing to fully present such evidence.

The issue of non-record Hitchcock error was raised in the court of first instance by way of petitioner's Second Motion for Post-Conviction Relief pursuant to Fla.R.Crim.P. 3.850, filed on June 30, 1989, and his amendment thereto. See, 2 App. 368a-391a, 392a-414a, and 419a-452a. On November 1, 1992, the court granted an evidentiary hearing, 2 App. 415a-418a, but on September 28, 1995, subsequently denied post-conviction relief without any evidentiary hearing. 2 App. 453a-455a. The petitioner timely appealed to the Supreme Court of Florida, which also denied relief. 1 App. 1a-18a; Alvord v. State, 694 So.2d 704 (Fla. 1997). This timely petition for writ of certiorari follows.

B. The Facts Material to the Questions Presented.

The petitioner was convicted by a jury of three counts of first degree murder on April 4, 1974. Following a further proceeding that night, the advisory jury recommended imposition of the sentence of death as to each of the three counts of conviction. On April 9, 1974, the trial court imposed the sentence of death.

At the time of petitioner's trial, the trial court's and the advisory jury's consideration of evidence mitigating against the death penalty was restricted by Florida law in capital sentencing proceedings to only those mitigating circumstances enumerated by state statute. See generally, Hitchcock v. Dugger, 481 U.S. 393, 395-99 & n.3 (1987); State v. Dixon, 283 So.2d 1, 9-10 (Fla. 1973) (if aggravating circumstance is found, death is presumed sentence unless "overridden by one or more of the mitigating circumstances provided in Fla. Stat. §921.141(7), F.S.A. [(1973)]."); Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976) ("Evidence concerning other matters [than those itemized in the statute] have [sic] no place in that proceeding any more than purely speculative matters calculated to influence a sentence through emotional appeal."). Even in petitioner's

direct appeal, the court below noted that 1974 capital sentencing hearings in Florida were "geared to consider any facts or opinions which may be relevant in determining the statutory mitigating and aggravating circumstances." Alvord v. State, 322 So.2d 533, 539 (Fla. 1975) (emphasis added); 1 App. 37a. At petitioner's trial, the court instructed the jury that "[T]he mitigating circumstances which you may consider if established by the evidence are these...." [Tr. 992 (emphasis added)]. The trial court then instructed the jury solely as to the mitigating circumstances enumerated in §921.141, Fla. Stat. (1973). [Tr. 992-93].

The prosecutor argued that the jurors had promised to "follow the law that the Legislature has set out and the court will read to you and instruct you on." [Tr. 966]. The prosecutor then proceeded to itemize the aggravating and mitigating circumstances specifically enumerated by statute to be considered. [Tr. 966-71]. Likewise, petitioner's defense counsel at trial confined his sentencing argument to the statutorily enumerated aggravating and mitigating circumstances. [Tr. 980-84]. The trial court's findings of fact in support of the death penalty additionally were limited to the aggravating and mitigating

circumstances enumerated in the applicable Florida statute at the time. 2 App. 456a-462a.

Following this Court's decision in Hitchcock, supra, petitioner brought an original proceeding in the Supreme Court of Florida for habeas corpus relief. In that proceeding, the State conceded, and the Supreme Court of Florida found, a Hitchcock violation, but held the violation harmless because, "[b]ased on the record," the non-statutory evidence actually presented at the 1974 sentencing proceeding was insufficient to change the sentencing decision had the proceeding been conducted in conformance with Hitchcock standards. Alvord v. Dugger, 541 So.2d 598, 599-600 (Fla. 1989) (emphasis added).

On June 30, 1989, the petitioner filed his Second Motion for Post-Conviction Relief in the trial court, noting that the grounds upon which the Eleventh Circuit denied relief in 1984, 2 App. 301a-305a, on his claim relating to restriction of mitigating circumstances had subsequently been specifically rejected in Hitchcock. See 2 App. 370a-371a. Furthermore, the petitioner raised the issue of mitigating circumstances never before developed on the record of the case, which circumstances could have been, but were not, presented to the jury in 1974 due to Florida's

statutory and judicial restrictions. These restrictions barred the introduction of evidence outside the statutory scheme to be introduced in mitigation of a sentence of death. See 2 App. 368a-414a.

At trial in 1974, the only arguably mitigating evidence presented was developed through one witness called by the State, the only witness presented at the sentencing phase, who testified in summary fashion on cross-examination as to certain mitigating circumstances. See Alvord v. State, 694 So.2d 704, 706 n.1 (Fla. 1997); 1 App. 8a-10a. Alvord v. Wainwright, 564 F.Supp. 459, 464, 489 (M.D. Fla. 1983) ("Petitioner's evidence of non-statutory mitigating circumstances was notably sparse in this case."); 1 App. 143a-145a, 211a. The State's expert who presented this testimony furthermore was a witness whose mental health testimony relating to petitioner included opinions contrary to those reached by a team of psychiatrists later appointed by the Governor of Florida. This team concluded petitioner was incompetent to be

executed.[1] Alvord v. State, 694 So.2d at 707 (Anstead, J., dissenting).

The non-record mitigating evidence proffered by the petitioner in the instant proceedings below, but not permitted development at an evidentiary hearing, may be summarized as follows.[2]

The petitioner has suffered from an extreme psychiatric disorder for the entirety of his life, requiring his institutionalization in 1958, when he was 13 years old. He remained in such institutions in the State of Michigan for most of his life until early 1973, when he escaped by walking away from a low security institution and came to Florida. At the time, he was under an adjudication of insanity and incompetency in the State of Michigan, which

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[1] Petitioner was found incompetent to be executed in November 1984, under §922.07, Fla. Stat. (1983), by a team of psychiatrists appointed by the Governor of Florida. See Alvord v. State, 694 So.2d 704, 705 (Fla. 1997); 1 App. 2a-3a. Such a finding is exceedingly rare. See Barbara Ward, Competency for Execution: Problems in Law and Psychiatry, 14 Fla. St. U.L.Rev. 37, 45 and n. 59 (1986).

[2] The compelling and dramatic nature of the evidence at issue is most clearly understood by review of the Affidavit of Helen B. (Lee) Norton, relating her 1989 interview of petitioner's former wife, Brenda Brock, f/k/a Brenda Alvord. 2 App. 403a-414a.

adjudication was in effect at the time of the offenses for which he now faces sentences of death. 2 App. 392a-414a.

At the time of trial, this evidence could not be considered by the sentencing court or advisory jury as a matter of Florida law, and so was not presented to the jury. 2 App. 377a-378a; see also, e.g., Alvord v. State, 322 So.2d 533, 539 (Fla. 1975); Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976) (only evidence of statutory mitigating factors admissible in capital sentencing proceeding). Additional evidence of Mr. Alvord's capacity for rehabilitation, drug and alcohol abuse and intoxication both throughout his life and on the day of the offenses of conviction, and his grotesque childhood deprivations was not presented or considered in his sentencing proceedings because of the state law limitations on mitigating circumstances in existence at the time of his trial in 1974. 2 App. 377a-378a.

Evidence available at the time of trial, but not presented, included testimony of Brenda Brock, who previously was married to the petitioner. Trial counsel failed to ask Ms. Brock for relevant mitigating information. 2 App. 413a-414a. Petitioner's parents were extremely cold toward one another and toward petitioner. 2 App. 405a. Petitioner's father rejected with profanity petitioner's

expressions of love, and his mother provided only worn-out clothes for the petitioner to wear to school, and at times dressed him in girl's clothes, resulting in other children making fun of him, although his parents had sufficient resources to buy appropriate clothing for him. 2 App. 394a, 405a-407a. He also suffered serious abuse in group and foster homes. 2 App. 397a-398a.

Petitioner's mother was seriously mentally ill for most of her life, requiring hospitalization and physical restraints. She was treated with Thorazine. 2 App. 408a-410a.

Petitioner's mental illness appears hereditary. In addition to petitioner and his mother, petitioner's namesake son has been diagnosed as psychotic and recommended to be institutionalized, but Ms. Brock fears placing him in a publicly supported institution because of her recollection of how badly the petitioner was treated in such institutions. 2 App. 411a-412a. Ms. Brock has observed petitioner's son progressively worsen in the same manner that she observed petitioner and petitioner's mother suffer ever worsening mental health. 2 App. 412a-413a. Ms. Brock has observed that her other three children, by her second marriage, do not suffer any such mental health difficulties. 2 App. 413a.

Petitioner sought out and attended church despite his parents' uninvolvement with any religious matters. 2 App. 396a-397a. Petitioner also spent a significant portion of his youth in foster and group homes, where he suffered repeated abuse, as well as abuse in one of the mental facilities in which he was institutionalized, one of which afforded no ventilation and frequently suffered summer temperatures in excess of 100 degrees. 2 App. 397a. In addition to having been rejected by his parents, 2 App. 394a-395a, petitioner was also rejected by his maternal grandmother on the basis of a single trivial incident. 2 App. 397a-398a. Despite this rejection, petitioner remained loyal and devoted to his now deceased mother throughout his life, sending her postcards and paintings. 2 App. 398a.

In addition to these grave difficulties, petitioner, at the time of the offenses of conviction, was under the extreme influence of drugs and alcohol to the extent of frequently being irrational and disoriented. 2 App. 398a. While awaiting trial, the petitioner was, for months, kept nude in a solitary confinement cell without even bedsheets or other linens, but despite these extreme conditions of confinement, he never presented any behavior problems while incarcerated pretrial. 2 App. 398a-399a.

Additionally, the sentencing court and jury were not presented evidence of the petitioner's artistic talent, including its showing of a sensitive aspect of his personality; the extreme degree of his continuing mental health difficulties; his loss of all family; and his good behavior while incarcerated. 2 App. 382a-386a, 392a-414a.

REASONS WHY THE WRIT SHOULD BE GRANTED

A. Introduction.

The petition for writ of certiorari in this case should be granted because of the important and recurring nature of the questions presented. The judgment below also contravenes clear precedent of this Court by failing to have afforded the petitioner even an opportunity to fully present the substantial evidence mitigating against a death sentence that both exists and was proffered below. The constitutionally important questions presented have not previously been resolved by the Court.

Absent an evidentiary hearing, the court below could not have engaged in any appellate weighing of the proffered mitigating evidence because the petitioner was denied the opportunity to fully present such evidence at an

evidentiary hearing. The court below denied an evidentiary hearing while purporting to engage in a qualitative comparison between the trial record and the proffered evidence, which is incapable of qualitative analysis without full and fair presentation at either an evidentiary hearing or a new sentencing proceeding.

Additionally, the decision below of the Supreme Court of Florida was unconstitutionally arbitrary by denying an evidentiary hearing to this petitioner, while having granted such relief to others presenting similar or less substantial non-record mitigating evidence than that proffered by the petitioner. See Parker v. Dugger, 498 U.S. 308, 321 (1991). The proffered mitigating evidence not presented at trial, because of the common misunderstanding of relevant constitutional requirements by Florida courts and attorneys in 1974, clearly rises to the level of showing a substantial and injurious effect on the outcome of the petitioner's sentencing proceeding. See California v. Roy, ___ U.S. ___, ___, 117 S.Ct. 337, ___, 136 L.Ed.2d 266, 270 (1996) (per curiam) (citations omitted).

The clear constitutional error "precluded the development of true facts," Smith v. Murray, 477 U.S. 527, 538 (1986), resulting in a fundamental miscarriage of justice

in imposition of the death penalty in this case. Murray v. Carrier, 477 U.S. 478, 495-96 (1986). This is especially true where the sentencing court and advisory jury considered unconstitutional aggravating factors. 2 App. 419a-452a; see also, infra, at 20 n.3.

B. Preclusion of Mitigating Evidence from Trial Record.

This case presents a Florida petitioner who suffered error, conceded by the State and recognized by the Supreme Court of Florida, see Alvord v. Dugger, 540 So.2d 598, 599-600 (Fla. 1989), under Hitchcock v. Dugger, 481 U.S. 393 (1987). The undisputed error at issue precluded inclusion in the trial record of substantial evidence mitigating against a sentence of death. The petitioner has indisputably suffered throughout his life from severe and hereditary mental health disorders, resulting in his having been adjudicated insane and incompetent in Michigan prior to the crimes of conviction, as well as a post trial finding in Florida that the petitioner was incompetent to be executed in 1984. The petitioner further proffered below dramatic evidence, not presented at trial, of childhood neglect and

abuse, as well as familial and social deprivation and rejection.

The mitigating evidence presented at trial, adduced solely through cross-examination of a psychiatrist testifying against the petitioner, was scant, Alvord v. Wainwright, 564 F.Supp. 459, 464, 489 (M.D. Fla. 1983), belying the conclusion of the court below that the mitigating evidence proffered by the petitioner in the post-conviction proceeding below was "very similar" to the evidence presented at trial and previously considered in other proceedings. Under the unconstitutional strictures of Florida law in 1974, this additional mitigating evidence was not presented at sentencing, and the petitioner has been denied the opportunity to present such non-record evidence at an evidentiary hearing in order to demonstrate the manifest injustice of his death sentence.

The Court has long recognized the constitutional necessity of consideration by the capital sentencer of the propensities and character of a capital defendant. See Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. 51, 55 (1937). Failure to consider the "intrinsic worth" of capital defendants in this calculus is fatal to a capital sentence or sentencing scheme. Furman v. Georgia, 408 U.S. 238, 270

(1972) (opinion of Brennan, J.). Absent any fair opportunity to present such evidence, the judgment of the Florida Supreme Court cannot withstand scrutiny under the constitutional principles enunciated by this Court.

Although the court below purportedly took "the asserted evidence in mitigation as true" in reaching its judgment, Alvord, 694 So.2d at 706, it characterized the petitioner's proffered evidence as:

> That he had escaped from a mental hospital at the time of the crimes, was under an adjudication of insanity and incompetency at the time of the crimes, was schizophrenic, had a history of drug and alcohol abuse, suffered from severe emotional problems as a result of a deprived childhood, has continued incompetency due to his mental problems, has a capacity for rehabilitation, and has artistic talent.

Id. However, the Florida Supreme Court misleadingly concluded that "much" of the proffered mitigating evidence is "similar" to that previously considered by the court below or was not presented because of the petitioner's refusal prior to trial to be examined by court-appointed psychiatrists in the absence of counsel. Id.; see also, Alvord v. Wainwright, 469 U.S. 956, 956-62 and n.1 (1984) (Marshall, J., dissenting from denial of certiorari) (Alvord's

refusal to be examined was based solely on his insistence that counsel be present, and trial counsel never appeared for scheduled examinations). The petitioner's non-record mitigating evidence proffered below, however, was substantially more expansive and dramatic than the evidence presented at trial, particularly the evidence that could have been presented at an evidentiary hearing or resentencing through the graphic testimony of the petitioner's former wife. 2 App. 403a-414a.

Available mitigating evidence includes evidence, not presented at trial, of the entire breadth of the petitioner's mental health history and that his mental health problems are genetic in origin, having mightily plagued his mother and son, as well as himself; his rejection by his mother, who also treated him in bizarre and irrational ways, such as dressing him in female clothing; his childhood rejection and hostility by his parents and grandparents; his efforts as a youth, despite his many other problems, to develop a religious life; his placement in foster and group homes as a child, where he was abused sexually and otherwise; his intoxication at the time of the crimes of conviction, and drug and alcohol problems so severe at that time that he was frequently irrational and disoriented; his good behavior

despite outrageous circumstances of his confinement while incarcerated prior to trial in a county jail; the fact that, through his conduct (and deficient performance by trial counsel) he was found to have waived a defense of insanity despite a substantial likelihood of acquittal had the defense been advanced; evidence that his personality includes a sensitive side. Further mitigating evidence has developed subsequent to trial, including the finding in 1984 that he was incompetent to be executed, the loss to death of the remainder of his family, and his good behavior while incarcerated following trial. 2 App. 392a-414a.

Under these circumstances, the petitioner was denied a full and fair hearing because the factual determination below is not fairly supported by the record as a whole, including the evidence proffered by the petitioner; no adequate fact-finding procedure was employed below where the petitioner was denied an evidentiary hearing at which to fully present the dramatic mitigating evidence proffered in cold pleadings; and the facts material to the issues presented were not permitted by the court below to be adequately developed because no hearing was afforded petitioner. Cf., Townsend v. Sain, 372 U.S. 293, 313 (1963) (enunciating alternative standards requiring evidentiary

hearing for federal habeas applicant). Given the absence of an opportunity for petitioner to fully present his non-record mitigating evidence at either an evidentiary hearing or a new sentencing proceeding, the Florida Supreme Court simply could not have conducted any independent and qualitative re-weighing of the non-record evidence proffered by petitioner, who was denied any opportunity to fully present both the substance and drama of such evidence.

As a result, the court below deprived the petitioner of an individualized qualitative determination, of his character and background relevant to the sentencing determination, and neither constitutionally re-weighed the evidence relevant to sentencing nor conducted any meaningful harmless error analysis.[3] Petitioner was afforded the opportunity only to proffer his substantial, non-record mitigating evidence, but was denied any hearing at which to fully present both the substance and dramatic impact of such evidence. In these circumstances, and

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[3] The gravity of the impact on the sentencing court and advisory jury of the preclusion of the mitigative evidence is magnified by unconstitutional aggravating factors having been presented at sentencing in violation of Espinosa v. Florida, 505 U.S. 1079 (1992), see 2 App. 419a-452a, although no separate independent Espinosa claim is before the Court.

particularly in light of its contrary decisions in the similar cases of Hall v. State, 541 So.2d 1125 (Fla. 1989), and Meeks v. Dugger, 576 So.2d 713 (Fla. 1991), the Florida Supreme Court's review in this case constitutes an arbitrary and irrational imposition of the death penalty. See infra at 23-28. The petitioner was deprived of the opportunity to fully present his mitigating evidence and also was deprived of any meaningful appellate review. See Parker v. Dugger, 498 U.S. 308, 321 (1991).

At the time of the petitioner's trial in 1974, the Florida statutory scheme, enforced by binding holdings of the Florida Supreme Court, precluded the advisory jury and sentencing court from being presented with substantial and relevant mitigating evidence. See Hitchcock v. Dugger, 481 U.S. 393, 396-97 (1987); State v. Dixon, 283 So.2d 1, 9-10 (Fla. 1973); Alvord v. State, 322 So.2d 533, 539 (Fla. 1975); Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976). This is constitutional error of the first magnitude, resulting in a fundamental miscarriage of justice. See Hitchcock, 481 U.S. at 398-99; Skipper v. South Carolina, 476 U.S. 1, 4 (1986); Eddings v. Oklahoma, 455 U.S. 104, 110 (1982); Lockett v. Ohio, 438 U.S. 586, 608 (1978).

The Court's review is warranted because the Court has not directly resolved the important and recurring questions presented in this petition. The judgment of the Florida Supreme Court, however, conflicts with principles clearly enunciated in decisions of this Court relating to presentation of evidence mitigating against imposition of the penalty of death. Accordingly, review by this Court is appropriate.

C. Arbitrary and Capricious Imposition of Death Penalty.

The Court additionally should grant review because the Florida Supreme Court, in reviewing Hitchcock error involving mitigating circumstances not within the trial record, made its determinations arbitrarily and capriciously, in violation of the Due Process Clause of the Fourteenth Amendment, in light of its contrary holdings in the most similar cases it has decided. For example, in Hall v. State, 541 So.2d 1125 (Fla. 1989), the court vacated the death sentence and ordered a new penalty phase proceeding on Hall's second state post-conviction motion where, although six categories of non-statutory mitigating evidence actually had been presented at the sentencing hearing, the Hitchcock

error in Hall prevented his trial counsel from investigating and discovering evidence showing that the defendant suffered extreme mental and emotional problems, suffered from organic brain dysfunction and was illiterate. See, id.; Alvord v. State, 694 So.2d 704, 707 (Fla. 1997). In Hall, the court specifically held that its denial of relief to Hall on a previous Hitchcock claim, involving whether evidence actually presented at trial was precluded from being considered by the sentencing court and advisory jury, did not constitute a procedural bar to Hall's subsequent post-conviction claim relating to mitigating evidence not previously made part of the record in the case. Hall, 541 So.2d at 1126.

Although the non-record mitigating evidence in Hall was "arguably less compelling" than that presented below by the petitioner, Alvord, 694 So.2d at 707 (Anstead, J., dissenting), the Florida Supreme Court denied relief to the petitioner while having granted relief in Hall. At worst for this petitioner, his non-record Hitchcock evidence is as strong as that in Hall; on the other hand, any legitimate, reasonably consistent analysis demonstrates that the petitioner's case is significantly and substantially stronger than that presented in Hall.

The court below not only failed to follow the constitutional requirements enunciated by this Court in considering the issues in this specific case, but also demonstrated in this case, as contrasted with its decisions in Hall and other cases, an arbitrary or irrational imposition or affirmance of a sentence of death. As stated in dissent below, "There is no credible basis for distinguishing this case from our holding in Hall v. State, 541 So.2d 1125 (Fla. 1989)...." Alvord v. State, 694 So.2d 704, 707 (Anstead, J., dissenting). "Under circumstances arguably less compelling, we afforded Hall the benefit of an evidentiary hearing before a trial court. There is no reasonable basis for treating Alvord differently." Id. at 707-08 (Anstead, J., dissenting).

Additionally, the Florida Supreme Court's decision below flies in the face of its decision in Meeks v. Dugger, 576 So.2d 713 (Fla. 1991). In Meeks, the court below concluded that Hitchcock error might be considered harmless only if evidence developed on the record were considered. The court concluded that counsel's failure to develop non-statutory mitigating evidence because of state statutory and judicial restrictions on such evidence at the time of trial, now clearly established by this Court to be

unconstitutional, negated any conclusion that the Hitchcock error was harmless. The court below ordered that Meeks be granted an evidentiary hearing on his non-record mitigating evidence claim. 576 So.2d at 716. The proffered evidence in Meeks involved mental health problems and treatment, a history of drug and alcohol abuse and severe problems resulting from a deprived childhood. Id.

In the face of Hall and Meeks, the court in the petitioner's case below clearly has failed to administer the death penalty "in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." Parker v. Dugger, 498 U.S. 308, 321 (1991), quoting, Spaziano v. Florida, 468 U.S. 447, 460 (1984) (internal quotations omitted). The Supreme Court of Florida, in reviewing the petitioner's non-record Hitchcock claim, has acted arbitrarily or irrationally in the face of its dispositions in the most similar cases it has considered. See Spaziano, 468 U.S. at 466-67; Alvord v. State, 694 So.2d 704, 707-08 (Fla. 1997) (Anstead, J., dissenting) ("no credible basis for distinguishing" Alvord from Hall, and "no reasonable basis for treating Alvord

differently" than Hall). On this basis, the Court's review is appropriate.

D. The Issues Presented Are Recurring and Constitutionally Important.

Despite the vintage of Hitchcock, Skipper, Eddings, Lockett and Ashe, the important issues presented in this petition are recurring, in Florida and elsewhere. The issues presented also involve violations of the fundamentally important constitutional requirement "that capital punishment be imposed fairly, and with reasonable consistency, or not at all," and "that a consistency produced by ignoring individual differences is a false consistency." Eddings, 455 U.S. at 112. At the time of petitioner's trial in 1974, he was sentenced to death under an unconstitutional statutory regime enforced during that period of time by the Florida Supreme Court prior to this Court's clear rebukes of the mid-1970s Florida capital sentencing process.

Under the strictures countenanced by Florida at the time of petitioner's trial, a wealth of non-statutory mitigating evidence was not sought, discovered or presented at trial because of the futility of attempting to do so under

the unconstitutional Florida capital sentencing scheme at the time. This constitutional error, given the substantial weight of the evidence proffered below, had a substantial and injurious effect on the outcome of the petitioner's sentencing proceeding. Accordingly, this Court should grant review of the important and recurring constitutional questions presented and correct the substantial errors made and countenanced in this case by the Florida Supreme Court.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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February 4, 1998

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

GARY ELDON ALVORD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

VOLUME 1

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Gary Eldon ALVORD, Appellant,

v.

STATE of Florida,
Appellee.

No. 86837.

Supreme Court of Florida.

April 10, 1997.

Rehearing Denied May 28, 1997.

PER CURIAM.

We have for review the trial court's order summarily denying Gary Eldon Alvord's Florida Rule of Criminal Procedure 3.850 motion for postconviction relief. In his motion, Alvord contended that the judge and jury were improperly prevented from considering evidence in mitigation. We have jurisdiction. Art. V, § 3(b)(1), (7), Fla. Const. For the reasons expressed, we affirm the trial court's order.

In 1974, Alvord was convicted and sentenced to death for three counts of first degree murder. The facts at trial reflected that he broke into and burglarized a home and killed three women who were in the home. The facts of those murders are set forth in detail in Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. denied, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed 2d 1226 (1976) (Alvord I).

This case has a long history, which is outlined below to properly reflect the procedural posture of the appeal at issue. In 1978, Alvord filed his initial rule 3.850 motion, the denial of which was affirmed by this Court in Alvord v. State, 396 So.2d 184 (Fla.1981) (Alvord II). Thereafter, he filed a habeas petition in federal district court, which was granted. Alvord v. Wainwright, 564 F.Supp. 459 (M.D. Fla. 1983) (Alvord III). That

decision was reversed by the Eleventh Circuit Court of Appeals. Alvord v. Wainwright, 725 F.2d 1282 (11th Cir.) (Alvord IV), cert. denied, 469 U.S. 956, 105 S.Ct. 355, 83 L.Ed.2d 291 (1984). Subsequently, the Governor ordered a competency evaluation pursuant to Section 922.07, Florida Statutes (1983). Alvord then filed a petition with this Court seeking to be evaluated separate from the procedures set forth in that statute. That petition was denied. Alvord v. State, 459 So.2d 316 (Fla. 1984) (Alvord V). After our decision in Alvord v. Alvord was found to be incompetent by psychiatrists appointed by the Governor. The Governor then ordered that a future mental examination be conducted on September 29, 1987.

On April 22, 1987, the United States Supreme Court issued Hitchcock v. Dugger,

481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), holding that it is error for a judge to refuse to consider nonstatutory mitigating circumstances and to instruct a jury not to consider such evidence. Prior to the Hitchcock decision, Florida juries and judges had generally considered only statutory mitigating circumstances in death penalty proceedings. Post Hitchcock this Court acknowledged that the United States Supreme Court's decision constituted a substantial change in the law, which meant that a Hitchcock error could be raised for the first time in a postconviction relief proceeding even if otherwise procedurally barred. Thompson v. Dugger, 515 So.2d 173 (Fla. 1987), cert. denied, 485 U.S. 960, 108 S.Ct. 1224, 99 L.Ed.2d 424 (1988); Demps v. Dugger, 514 So.2d 1092 (Fla.1987).

On September 24, 1987, Alvord filed a petition for writ of habeas corpus with this Court seeking a stay of the second mental examination ordered by the Governor, asserting Hitchcock error. On February 9, 1989, this Court denied relief. Alvord v. Dugger, 541 So.2d 598 (Fla.1989) (Alvord VI), cert. denied, 494 U.S. 1090, 110 S.Ct. 1834, 108 L.Ed.2d 963 (1990). In Alvord VI, this Court acknowledged that Hitchcock error had occurred, but found that error to be harmless.

One month after our decision in Alvord VI, this Court issued Hall v. State, 541 So.2d 1125 (Fla.1989), in which we stated that, to allow for an evidentiary hearing, a Hitchcock claim should be presented to the trial court as a Rule 3.850 proceeding rather than as a habeas corpus petition. Thereafter,

Alvord filed this rule 3.850 proceeding pursuant to Hall again seeking relief under Hitchcock. In 1992, the trial court entered an order granting an evidentiary hearing to allow Alvord to present nonstatutory mitigating evidence. Before an evidentiary hearing was held on this issue, Alvord amended his motion to include an additional claim unrelated to this appeal. After considering the amended motion and argument of counsel the trial court reversed its earlier ruling by denying an evidentiary hearing and finding the Hitchcock claim to be procedurally barred. It is this final ruling that is the subject of this appeal.

Alvord contends that the trial judge erred in denying his rule 3.850 motion without holding an evidentiary hearing. He asserts that the procedural posture of this case is the same as that at issue in

Hall and that an evidentiary hearing is necessary to allow him to present nonrecord, nonstatutory evidence that has never been considered by any court. Further, he argues that this Court's decision in Alvord VI, in which we found the Hitchcock error to be harmless, does not preclude consideration of the instant claim because in that case we only considered evidence that was on the record. We disagree with these contentions because we find that the nonrecord, nonstatutory evidence Alvord has outlined in the motion at issue is very similar to that which we considered in his previously rejected habeas corpus petition.

In the habeas corpus petition we addressed in Alvord VI, Alvord contended that he was denied the opportunity to present nonstatutory mitigating evidence

concerning, among other things, his capacity for rehabilitation; the history of mental illness within his family; his traumatic life experiences while involuntarily committed to mental institutions; and the fact he was a patient in mental institutions for twelve of the fourteen years preceding the murders in issue while undergoing treatment as a paranoid schizophrenic. In finding the Hitchcock error to be harmless, we first reiterated the statutory aggravating and mitigating circumstances that were properly considered at the penalty phase proceeding and found to exist by the trial judge. Specifically, the trial judge found three aggravating circumstances (committed during the course of a felony, each of the murders was heinous, atrocious, or cruel, and great risk of bodily harm to more than

one person), and two mitigating circumstances (at the time of the crime, Alvord was under the influence of extreme mental or emotional disturbance and his capacity to conform his conduct to the requirements of law was impaired). We also noted that much of the evidence in mitigation outlined in the habeas corpus petition had been presented to the judge and jury.[1] Finally, we concluded that the

---

[1] During the penalty phase proceeding, one witness was called to testify, Dr. Ames Robey. Although Dr. Robey was called to testify on behalf of the State, he testified to factors in both aggravation and mitigation. As to statutory mitigation, Dr. Robey testified that Alvord was under extreme stress at the time he committed the murders and that his capacity to form his conduct to the requirements of the law was impaired. On cross-examination by defense counsel, Dr. Robey was also allowed to testify that Alvord was confined to a series of mental institutions beginning at age thirteen, had escaped from the mental institutions on numerous occasions, was mentally ill, had a personality disorder with schizoid or paranoid features, had been rejected by his mother who was also mentally ill, and

additional evidence in mitigation set forth in the petition was "clearly insufficient to change the sentencing decision, given the circumstances in this case." Alvord VI, 541 So.2d at 600.

In his latest petition, Alvord argues that the judge and jury should have been allowed to consider that he had escaped from a mental hospital at the time of the crimes, was under an adjudication of insanity and incompetency at the time of the crimes, was schizophrenic, had a history of drug and alcohol abuse, suffered from severe emotional problems as a result of a deprived childhood, has continued incompetency due to his mental problems, has a capacity for rehabilitation, and has artistic talent. This asserted evidence in mitigation is

---

had problems starting as early as age seven.

comparable to that which we considered in Alvord VI. Further, much of this evidence is similar to that presented during the penalty phase proceeding or was specifically not presented at trial based on Alvord's refusal to be examined by court appointed psychiatrists.[2] Given that we previously found the Hitchcock error to be harmless based on very similar evidence, we must again reject Alvord's request for a new penalty phase proceeding. Because we take the asserted evidence in mitigation as true in reaching this decision, we find that an evidentiary

---

[2] In Alvord II, we addressed the issue of whether Alvord's counsel was ineffective for failing to claim insanity as a defense. We rejected that contention, finding that the record was replete with various pre-trial motions filed by defense counsel on this issue but that defense counsel had been precluded from presenting any evidence of insanity because Alvord had refused to communicated in any manner with the two psychiatrists appointed for that purpose.

hearing would not alter our conclusion. This is especially true given that much of the evidence in mitigation goes to Alvord's mental condition, which was specifically found to be a factor in mitigation. Moreover, we do not find that our decision in Hall mandates a contrary conclusion.

We did conclude in Hall that a previous finding of harmless error on a Hitchcock claim raised under a habeas corpus petition did not bar a subsequent review of a Hitchcock claim under a Rule 3.850 motion. In so finding, however, we stated that the trial court's express orders in Hall's trial effectively precluded Hall's counsel from investigating, developing, and presenting possible nonstatutory mitigating circumstances. We additionally concluded that Hall had raised "significant

additional nonrecord facts" that were not considered in his habeas corpus proceeding. For instance, in his habeas petition, Hall contended that, had the following nonstatutory evidence been considered, he would have received life: (1) he was not the shooter; (2) he attempted to dissuade his accomplice from beating and killing the victim; (3) he took police to the body; (4) he had used alcohol and drugs; (5) he offered no resistance when arrested; and (6) the evidence against him was weak. We rejected this claim, finding that this evidence was presented to the jury and judge through Hall's testimony; that the evidence was speculative at best; and, when balanced against the evidence in aggravation, that Hall's sentence would have been no different. In his subsequent rule 3.850 motion, Hall claimed that the

Hitchcock error prevented his attorney from investigating and discovering evidence in mitigation that would have shown that he suffered from an extreme mental and emotional disturbance, suffered from organic brain dysfunction, and was illiterate. Unlike the situation at issue, the evidence raised in Hall's rule 3.850 motion was substantially different from that raised in the habeas petition and it was this substantially different evidence that we found warranted a new penalty phase proceeding.

In conclusion, because we find that the evidence outlined in Alvord's rule 3.850 motion is not substantially different from that which we considered and rejected as warranting a new penalty proceeding in Alvord VII, we find that the trial court properly denied his motion.

Accordingly, we affirm the trial court's order summarily denying Alvord's rule 3.850 motion.

It is so ordered.

OVERTON, SHAW, GRIMES, HARDING and WELLS, JJ., concur.

ANSTEAD, J., dissents with an opinion, in which KOGAN, C.J., concurs.

ANSTEAD, Justice, dissenting.

There is no credible basis for distinguishing this case from our holding in Hall v. State, 541 So.2d 1125 (Fla.1989), in which we decided as a matter of policy that Hitchcock claims should be presented under rule 3.850 rather than as habeas corpus petitions to this Court. Importantly, we acknowledged that "[a]ppellate courts are reviewing, not factfinding, courts." 541 So.2d at

1120. Further, we specifically rejected the trial court's conclusion that our earlier denial of a habeas corpus petition based upon the same grounds barred rule 3.850 relief for Hall:

> We do not agree with the trial court's ruling that our denial of relief in Hall VI, constitutes a procedural bar under the law of the case and res judicata. This case involves significant additional non-record facts which were not considered in Hall VI because that was a habeas corpus proceeding with no further development of evidence beyond the record. In this case, however, we are aided by the trial court's findings of fact at the rule 3.850 hearing. Moreover, as we have stated on several occasions, Hitchcock is a significant change in law, permitting defendants to raise a claim under that case in postconviction proceedings. Cooper v. Dugger, 526 So.2d 900 (Fla. 1988); Thompson v. Dugger, 515 So.2d 173 (Fla.1987), cert denied, 485 U.S. 960, 108 S .Ct. 1224, 99 L.Ed.2d 424 (1988); McCrae v. State, 510 So.2d 874 (Fla.1987); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987).

541 So.2d at 1126. It is interesting to note that the vote in Hall was four to three with the three justices in dissent all expressing the view that no evidentiary hearing was necessary because even taking the proffered mitigation evidence as true, they did not believe it would change the outcome, i.e., the imposition of the death penalty. The position of the dissenters in Hall is remarkedly similar to the majority's conclusion here that, "Because we take the asserted evidence in mitigation as true in reaching this decision, we find that an evidentiary hearing would not alter our conclusion." Majority opinion at 706.

We should apply the analysis and holding of the majority in Hall and not the analysis and holding of the dissenting justices. In failing to do so, we have erred in substituting our opinion for that

of a jury who no one can deny should have been allowed to hear the defendant's mitigating evidence. As noted by all of the opinions in this case, we are dealing with a defendant who has a lengthy and undisputed history of serious mental illness, who has even been found incompetent by a team of State experts appointed by the Governor, contrary to the opinion of Dr. Robey, the State's trial expert whose testimony is extensively relied on in the majority opinion. Under circumstances arguably less compelling, we afforded Hall the benefit of an evidentiary hearing before a trial court. There is no reasonable basis for treating Alvord differently.

KOGAN, C.J., concurs.

Gary Eldon ALVORD, Appellant,

v.

STATE of Florida, Appellee.

No. 45542.

Supreme Court of Florida.

Sept. 17, 1975.

Rehearing Denied Dec. 15, 1975.

ADKINS, Chief Justice.

This is a direct appeal from a judgment adjudging defendant guilty of murder in the first degree and a sentence of death.

An indictment, containing three counts of murder in the first degree, charged that, on June 17, 1973, the appellant (hereinafter referred to as defendant) murdered Georgia Tully (hereinafter referred to as Georgia), Ann Herrmann (hereinafter referred to as Ann), and Lynn Herrmann (hereinafter referred to

as Lynn). The defendant was alleged to have committed each of the murders by strangling the named victim to death by means unknown to the Grand Jury.

In the early afternoon of June 18, 1973, the bodies of Georgia, Ann and Lynn were discovered in a home in Tampa, Florida. The home was owned by Ann, who was the daughter of Georgia. Lynn, eighteen years of age, was the daughter of Ann and lived at home with her mother.

Each of the three women was found in a separate room in the house and each had been strangled with a piece of cord. A vaginal test on Lynn showed the presence of semen and there was a slight abrasion on the right side of her head. The front door of the house had been kicked open and the condition of the house tended to indicate that the murderer burglarized the house either before or after the three

women had been murdered. The time of death was tentatively established as occurring between 11:00 a.m., Saturday, June 16, 1973, and 1:30 p. m., Monday, June 18, 1973.

At the trial the jury returned a verdict finding the defendant "guilty as charged in the indictment." After the trial of the penalty phase, the jury recommended to the court that it impose the death penalty upon defendant under each count of the indictment. The trial judge then imposed the death sentence in conformity with the recommendation of the jury and filed an order setting out his finding of facts in support thereof. Upon denial of the motion for new trial, defendant filed a timely notice of appeal.

Defendant first makes a three-pronged attack upon the constitutionality of Fla.Stat. §§ 775.082, 782.04 and 921.141,

F.S.A., saying that

(a) The present capital sentencing procedures are unconstitutionally discretionary;

(b) The statutory distinction between first and second degree felony murder is unconstitutionally vague;

(c) The death sentence is per se cruel and unusual.

He requests that we reconsider State v. Dixon, 283 So.2d 1 (Fla.1973). Once again we hold the statutes to be constitutional and reaffirm State v. Dixon, supra. See Sullivan v. State, 303 So.2d 632 (Fla. 1974) and Alvord v. State, 307 So.2d 433 (Fla. 1975).

Defendant contends that the provisions of the Florida Statute allowing a jury to render an advisory opinion on

the question of the sentence to be imposed in a capital case by a simple majority vote violates the defendant's right to a trial by jury guaranteed by the Florida and United States Constitution. The defendant recognizes that Johnson v. Louisiana, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152, upheld a statute which allowed a conviction to be entered in certain felony cases upon a nine-three plurality verdict of the jury, but says that the court based its decision upon the fact that the Louisiana statute required the concurrence of a "substantial majority" of the jurors. The contention advanced by defendant in the case sub judice was rejected by the United States Supreme Court in the Johnson case when the Court said:

> "We note at the outset that this Court has never held jury unanimity to be a requisite of due process of law. Indeed, the Court has more than once expressly said that '[i]n criminal cases due process of law is not denied by a state law which dispenses with the necessity of a jury of twelve, or unanimity in the verdict.' Jordan v. Massachusetts, 225 U.S. 167, 176, 32 S.Ct. 651, 56 L.Ed. 1038, 1042 (1912) (dictum). Accord, Maxwell v. Dow, 176 U.S. 581, 602, 605, 20 S.Ct. 448, 44 L.Ed. 597, 605, 606 (1900) (dictum)." 406 U.S. at 359, 92 S.Ct. at 1623, 32 L.Ed.2d at 157, 158.

The argument of defendant on unanimous v. majority recommendations was specifically met by this Court in Watson v. State, 190 So.2d 161 (Fla.1967), when it stated:

> "The provisions of F.S. Sections 794.01 and 919.23, F.S.A., authorizing a jury by a majority vote to recommend mercy for a defendant it has found guilty in a capital case are beneficial to the defendant. Requirement of a unanimous vote would lessen defendant's chance for mercy. Without these provisions said

statutes would result in a defendant found guilty thereunder being automatically sentenced to death. It lies within the province of the Legislature to prescribe the punishment to be imposed upon a person who is found guilty or pleads guilty to an offense as well as the method or manner of its imposition. The power to define what acts shall constitute criminal offenses and what penalties shall be inflicted on offenders is legislative. 14 Am.Jur., Criminal Law, § 16. The legislature may authorize a jury to assess punishment. 15 Am.Jur., Criminal Law, § 510. It is not necessary in the sentencing phase of a criminal case that the jury's verdict be unanimous where the legislature provides otherwise. The cases cited by the Appellants from other jurisdictions do not construe statutes similar to F.S. Sections 794.01 and 919.23, F.S.A., which require only a majority vote for a recommendation of mercy. There is no provision in our Constitution requiring a unanimous verdict in respect to a recommendation of mercy." (pp. 166, 167)

The State, as part of its direct case, called Detective Donald Dufour, of

the Lansing Police Department, who had arrested the defendant in Lansing, Michigan, about three weeks after the murders. Dufour originally arrested defendant in connection with a burglary which had occurred in the Lansing area. Dufour took defendant from the jail section of the Police Department to the office of Detective Bureau and gave him the following advice as to his rights:

> "A First of all I advised him that, who I was. I advised him who I was and that I was a detective with the Police Department in Lansing. I advised him that he didn't have to talk to me, that anything he said will be used in court against him. I advised him that he had to, he had a right to have an attorney. He had a right to have an attorney present before he answered any questions or made any statement.
>
> Q All right. Did he request to have an attorney?
>
> A No, sir, he did not.
>
> Q Did he request to remain silent?

A No, sir, he did not.

Q Did you or anyone in your presence promise him anything in order for him to make a statement?

A No, sir.

Q Did you or anyone in your presence threaten him to make a statement?

A No, sir.

Q Did you promise him immunity of he made a statement?

A No, sir.

Q Did you coerce him in any way to make a statement?

A No, sir.

Q Did he indicate whether or not he understood his rights?

A Yes, sir. He told me he was aware of his rights. (Tr. pp. 689, 690)

When Dufour advised defendant that he wanted to talk to him about a "safe job," he defendant looked at him and said, "I'm a rapist, not a God-damn thief." When

Dufour asked defendant what was meant by that, the defendant told him he vas wanted for three murders in Florida. Dufour then said, "I thought it was two" nd defendant replied, "Maybe they forgot me." When Dufour asked, "Did you do it" defendant responded, "They will have to prove it."

Before permitting Detective Dufour to give this testimony, the trial judge excluded the jury and heard the State's proffer. The trial judge determined that the statement had been made freely and voluntarily and ruled it to be admissible, but cautioned Detective Dufour not to mention to the jury the nature of the offenses he was investigating (the burglary and the safe job). Over objection of defendant, the statement, "I am a rapist, not a God-damn thief" was admitted into evidence.

Defendant says that Dufour failed to advise him that an attorney would be appointed to represent him if he were an indigent. This deficiency in the warning, says defendant, violates the principles set out in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) and the resulting statements should have been excluded.

Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974), recognizes that the Miranda decision on custodial statements by defendants was not intended to create a constitutional straightjacket, but rather to provide practical reinforcement for the right against compulsory self-incrimination. In that case, the defendant received all of the Miranda rights with the exception that, if he could not afford counsel, the State would provide him one free of

charge. The United States Supreme Court held that the police conduct did not abridge the defendant's constitutional privilege against self-incrimination but only departed from the prophylactic standards enunciated in Miranda. In its opinion the Court said:

> "Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose.
>
> * * *
>
> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least, negligent conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the

> courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care towards the right of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." Michigan v. Tucker, 94 S.Ct. at 2365.

Defendant's statement that he was a rapist, not a thief, was relevant in view of evidence showing that the underwear of one of the victims was found in a room separate from her body, and her pubic area was exposed. Also, there was evidence of male sperm in her vagina, and testimony that defendant, on the morning after he described the murder to his girl friend, had nail scratches on his chest.

The trial court complied with the United States and Florida constitutional standards pertaining to the admissibility of the custodial statements by defendant.

Contrary to the contention of defendant, the trial judge committed no error in permitting Dr. William G. Gibson to testify that he found sperm from a male when he conducted a vaginal smear on the victim, Lynn.

Defendant complains because the trial judge allowed testimony that defendant owned a gun at the time the murders were committed. Defendant says the evidence was irrelevant as there was no showing that defendant took the gun with him. Defendant's girl friend testified that on the evening after defendant had committed the murder, he stated to her, "I had to rub out three people last night, Zelma," and in response to her question as to whom: "Ann, Lynn and her Mom." Defendant told her he had strangled them after placing them in separate rooms. Defendant told his girl friend that he could not

shoot them because it would make too much noise, and that was why he had to strangle them. The trial judge did not commit error in allowing testimony to be given concerning the gun, as great latitude should be allowed in the reception of indirect or circumstantial evidence. See Astrachan v. State, 158 Fla. 457, 28 So.2d 874 (1947). Evidence of the defendant's ownership of a gun was a circumstance lending credence to the testimony of the girl friend.

Defendant contends that error was committed when Dr. Ames Robey was permitted to testify in the penalty phase of the trial that defendant was sane at the time he had committed a rape in the State of Michigan.

Defendant had been charged with the rape of a ten-year-old girl in Michigan and upon trial, a verdict of not guilty by

reason of insanity was entered. Dr. Robey examined defendant in connection with the Michigan proceeding in 1969 and 1970. At that time the Doctor saw "evidence of incipient or latent or underlying mental illness" but, in his opinion, defendant understood the charges and was competent to stand trial. Even though defendant was mentally ill "to a minimal degree, he was aware of the wrongfulness of his act at that time."

The test for criminal insanity in Michigan was broader than the test in Florida. Under Michigan law a person was not held responsible for his act if the act was the result of an irresistible impulse due to mental illness.

In the penalty proceedings certain types of evidence which may be inadmissible in a trial on guilt may be admissible and relevant to enable the jury

to make an informed recommendation based on the aggravating and mitigating circumstances concerning the acts committed. In fact, one of the statutory mitigating circumstances is the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. Fla.Stat. § 921.141 (6)(f), F.S.A. There should not be a narrow application or interpretation of the rules of evidence in the penalty hearing, whether in regard to relevance or to any other matter except illegally seized evidence. State v. Dixon, supra. See also Sullivan v. State, 303 So. 2d 632 (Fla.1974), and Smith v. State, 303 So.2d 694 (Fla.App.1st, 1974). This testimony was properly allowed into evidence.

Defendant says that the testimony relative to the Michigan prosecution for

rape should have been barred under the doctrine of collateral estoppel as announced in Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). "Collateral estoppel" means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future law suit. Where a previous judgment of acquittal was based upon a general verdict, the federal rule of collateral estoppel requires the Court to examine the record of the prior proceeding and to conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. The United States Constitution's Fifth Amendment guaranty against double jeopardy protects a man who has been acquitted from

having to "run the gauntlet" a second time. A Michigan verdict of "not guilty" would trigger the doctrine of collateral estoppel, so that evidence of the offense would not have been admissible in any phase of the trial.

But the Michigan verdict was "not guilty by reason of insanity." Although any evidence concerning the Michigan case was inadmissible during the trial upon the guilt or innocence of defendant in connection with the Florida offenses, this evidence was admissible in the hearing on the penalty phase after the determination of guilt. The penalty hearing is geared to consider any facts or opinions which may be relevant in determining the statutory mitigating and aggravating circumstances. The Michigan Court determined that defendant either (1) did not have the minimal capacity to

distinguish right from wrong, or (2) was suffering from a mental illness which caused an irresistible impulse to commit the act. The doctor who examined the defendant at that time, and again during the Florida trial, was certainly competent to testify as to the mental condition of defendant. This matter was relevant to the question of mitigating or aggravating circumstances during the penalty phase of the proceeding. The latter issue involved in the penalty phase was not determined by any final judgment of the Michigan court, so the doctrine of collateral estoppel is not applicable.

The evidence was sufficient to sustain the verdict of guilt. In addition to the evidence discussed above, there was testimony that defendant had possession of some of Ann's jewelry after the murder; the police found a short piece of rope in

a dresser drawer in defendant's apartment which was the same type of rope used to strangle all three of the victims; one of defendant's shirts had blood on it; a witness testified that on the morning after the murder defendant had over $100; one of the victim's purses used to store large quantities of money was found to be empty; defendant told his girl friend he had to kick the door in to get into the house and the evidence showed that this was done.

The evidence corroborated the testimony of the girl friend, Zelma Hurley. She testified that on Saturday night, June 16, 1973, defendant left her about 1:30 a.m. and was gone until 6:30 a.m. When Zelma arose she observed the money in possession of defendant. That night defendant told her, "I had to rub out three people last night," and

identified them as Ann, Lynn and Georgia. Defendant then told her the details of the murder.

The jury is charged with the responsibility of resolving factual conflicts. When it is shown that the jurors have performed that duty faithfully and honestly and reached a conclusion that squares with reason, it takes more than a difference in opinion as to what the evidence shows for this Court to reverse them. The conflicts were resolved in favor of the State and the evidence was sufficient as a matter of law to sustain the verdicts. See State v. Smith, 249 So.2d 16 (Fla.1971).

It is our responsibility to review the sentence in the light of the facts presented in the evidence, as well as other decisions, and determine whether or not the punishment is too great. See State

v. Dixon, supra. Three murders were committed while the perpetrator was engaged in the commission of the felony offense of burglary. Each of the murders was especially heinous, atrocious and cruel in that the homicides were committed through strangulation by use of a rope. This could only be accomplished through a cold, calculated design to kill, as distinguished by a single shot from a firearm during an outburst of anger. The great risk of serious bodily harm by death to other persons is apparent, in that defendant obviously murdered two of the victims in order to avoid a surviving witness to the murder of the other victim. The murders were not committed under circumstances which defendant believed to provide a moral justification or extenuation for his conduct and his capacity to conform his conduct to the

requirements of law was not impaired. His age, 26 years, had no particular significance. These aggravating circumstances outweigh any circumstances which would mitigate the sentence in this case.

There is no way that the Legislature could program a judicial computer with all of the possible aggravating factors and all of the possible mitigating factors in each case. See State v. Dixon, supra. The law does not require that capital punishment be imposed in every conviction in which a particular state of facts occur. The statute properly allows some discretion, but requires that this discretion be reasonable and controlled. No defendant can be sentenced to capital punishment unless the aggravating factors outweigh the mitigating factors. However, this does not mean that in every instance

under a set state of facts the defendant must suffer capital punishment.

The statute contemplates that the trial jury, the trial judge and this Court will exercise reasoned judgment as to what factual situations require the imposition of death and which factual situations can be satisfied by life imprisonment in light of the totality of the circumstances present in the evidence. Certain factual situations may warrant the infliction of capital punishment, but, nevertheless, would not prevent either the trial jury, the trial judge, or this Court from exercising reasoned judgment in reducing the sentence to life imprisonment. Such an exercise of mercy on behalf of the defendant in one case does not prevent the imposition of death by capital punishment in the other case.

Sullivan v. State, supra, involved a death sentence which was held to be appropriate by this Court. During the course of a robbery defendant abducted the victim, struck him with a tire iron, and shot him with both barrels of a shotgun in the back of the head. The defendant reloaded and discharged both barrels again into the victim's head. Just as in Sullivan, this case involves the commission of a burglary and the murder of the victim. The deliberate actions of Sullivan in repeatedly shooting the victim is no less heinous and atrocious than the actions of defendant Alvord in deliberately strangling three women with a rope.

Gardner v. State, 313 So.2d 675 (Flat 1975), was an appeal from a death sentence for the murder of a female. The murder was accomplished by the use of a blunt

instrument, the victim's body containing at least 100 bruises, abrasions and contusions. There was a massive hemorrhage of the pubic area. The victim was beaten so badly that the murder was looked upon as being especially heinous, atrocious and cruel. These aggravating circumstances outweighed any mitigating circumstances and the death penalty was upheld. Certainly, the atrocious manner in which Gardner murdered his victim is no more atrocious or heinous than the atrocious manner in which Alvord coldly strangled three females while committing his burglary.

A female victim was involved in Hallman v. State, 305 So.2d 180 (Fla.1974). The defendant committed the crime of robbery, cut the victim about the throat and neck with broken glass, slitting her throat and causing her death.

Hallman had been convicted of two previous crimes involving an assault upon a young woman with a dangerous weapon. Alvord had been involved with the rape of a young girl in Michigan, and the evidence indicated that an assault was made upon the deceased Lynn, who was 18 years of age. The act of Hallman in cutting the victim with broken glass is no more heinous than the strangulation of three women by Alvord. Comparing the aggravating and mitigating circumstances with those shown in other capital cases and weighing the evidence in the case sub judice, our judgment is that death is the proper sentence.

Pursuant to Rule 6.16(b), Florida Appellate Rules, we have reviewed the evidence to determine whether the interest of justice requires a new trial. No reversible error is made to appear and the

evidence does not reveal that the ends of justice require that a new trial be awarded. We find that the judgment and sentence of the trial court in this cause is in accordance with the justice of the cause.

Accordingly, the judgment and sentence of the circuit court are hereby affirmed.

It is so ordered.

ROBERTS and OVERTON, JJ., and AGNER and PATTERSON, Circuit Judges, concur.

ENGLAND, J., concurs in part and dissents in part with an opinion.

ENGLAND, Justice (concurring in part and dissenting in part).

I concur with the majority's decision that defendant had a fair trial and that his conviction for first degree murder was

amply warranted by the evidence."[1] I do not agree, however, that any valid death sentence can be imposed under Florida's death sentence statute (Section 921.141, Florida Statutes (1973)).

Under the multiple views expressed in Furman v. Georgia, 408 U.S. 238, 92 S.Ct.

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[1] Defendant has challenged the applicable statute on the ground that the statutory distinction between first and second degree murder is unconstitutionally value. I share Justice Boyd's doubts that any juror of common intelligence, or most judges, can comprehend the distinction. See State v. Dixon, 283 So.2d 1, 26-27 (Fla. 1973) (Boyd, J., dissenting). The statute has recently been held unconstitutional by a majority of this Court, however, in Dixon and in Alvord v. State, 307 So.2d 433 (Fla. 1975). I do not perceive my legal duties to include a refusal to follow fundamental jurisprudential concepts such as stare decisis ("let the decision stand") and judicial restrain. In the absence of intervening events of compelling legal significance, and none are presented with respect to verbal vagueness between first and second degree murder, the Court should not overturn contemporaneous case law merely because there have been personnel changes in the Court.

2726, 33 L.Ed.2d 346 (1972), the selective, arbitrary imposition of the death penalty is prohibited by the Eighth and Fourteenth Amendments to the United States Constitution. I believe our death sentence statute fosters rather than avoids the proscribed unbridled discretion. I share the views of our statute which were expressed by Mr. Justice Ervin and Mr. Justice Boyd in State v. Dixon, 283 So.2d 1, 11, 23 (Fla. 1973) (dissenting). I can now add to their analyses that Florida's experience under the statute proves their perceptions correct.

Since the sentencing statute was enacted, we have reviewed several capital felony cases in which the death sentence

could have been imposed.[2] These cases range from love triangle deaths[3] to execution type slayings.[4] In two decided cases a jury recommended life, the judge imposed a death sentence, and we affirmed his sentence.[5] In four decided cases a jury recommended death, the judge concurred, and we affirmed.[6] In one

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[2] Since we do not have jurisdiction to review capital cases resulting in a sentence of life imprisonment (absent some other basis for our jurisdiction), we have no idea how many persons convicted of capital crimes have avoided a judge's sentence of death. Nor do we know what the juries recommended in those cases.

[3] Dorminey v. State, 314 So.2d 632 (Fla., filed Apr. 16, 1975).

[4] Sullivan v. State, 303 So.2d 6332 (Fla. 1974); Alford v. State, 307 So.2d 433 (Fla. 1975).

[5] Sawyer v. State, 313 So.2d 680 (Fla., filed Feb. 19, 1975); Gardner v. State, 313 So.2d 675 (Fla., filed Feb. 26, 1975).

[6] Alford v. State, 307 So.2d 433 (Fla. 1975); Hallman v. State, 305 So.2d 180 (Fla. 1975); Spinkelink v. State, 313

decided case the defendant entered a guilty plea, no jury recommendation was received (for which deficiency we reversed), and the judge imposed a sentence of death.[7] In another case a jury recommended and the judge sentenced life imprisonment.[8] In still another, a jury recommended, the judge sentenced and we affirmed a death sentence, while an accomplice was allowed a life sentence on the basis of a plea bargain for his testimony.[9]

So.2d 666 (Fla., filed Feb. 19, 1975); Proffitt v. State, 315 So.2d 461 (Fla., filed May 28, 1975).

[7] Lamadine v. State, 303 So.2d 17 (Fla. 1974).

[8] Dorminey v. State, supra. We affirmed the conviction and sentence in the course of reviewing an independent constitutional question.

[9] Sullivan v. State, 303 So.2d 632 (Fla. 1974).

Perhaps it would be possible to analyze each of these cases, together with those life sentences we have never reviewed, and conclude that Florida's bifurcated sentence procedure[10] exhibits a non-discriminatory pattern consistent with the dictates of Furman. I cannot, however.[11] I believe our statute will produce Furman-prohibited arbitrariness so long as human discretion is injected into one, let alone three, stages of the sentencing process.[12] Until such vagaries

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[10] The sentence procedures set out in the act are usually described as "bifurcated." In reality, however, the statute creates three triers in the sentencing process - the jury, the judge, and this Court.

[11] The statute defies uniformity at the outset by limiting our view to only the capital cases where the judge imposes death.

[12] In Furman, Justice Douglas traced the origins of the Eighth Amendment to the United States Constitution, suggesting that it was rooted in part in earlier but

are sanctioned by the United States Supreme Court, I cannot reconcile this legislation with the United States Constitution.

I would affirm defendant's conviction, but I would reduce his sentence to life imprisonment.[13]

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familiar discretionary prejudices applied against minorities, the poor and the unpopular. 408 U.S. at 240-57 92 S.Ct. 2726. Even if those evils can be said to be overcome by the inclusion on juries of a representative social mix the Florida death sentence statute operates to destroy, not preserve, that saving feature. No one could seriously contend that a similar societal mix is evidence on either the trial or appellate benches of this state, and in the only two cases brought to us for review in which there has been a jury-judge, disagreement under the statute, the jury's recommendation has been discarded. Sawyer v. State, 313 So.2d 680 (Fla, filed Feb. 19, 1975); Gardner v. State, 313 So.2d 675 (Fla., filed Feb. 26, 1975).

[13] Anderson v. State, 267 So.2d 8 (Fla. 1972).

No. 75-6596. Gary Eldon Alvord, petitioner, v. Florida.

428 U.S. 923, 49 L.Ed.2d 1226, 96 S.Ct. 3234, reh den (US) 50 L.Ed.2d. 157, 97 S.Ct. 195.

July 2, 1976. Petition for writ of certiorari to the Supreme Court of Florida denied.

Same case below, 322 So.2d 533.

Mr. Justice Brennan and Mr. Justice Marshall, dissenting:

Petitioner contends that he was unconstitutionally convicted because a statement he made during in-custody interrogation was admitted in evidence during the prosecution's case-in-chief, despite the absence of any warning to petitioner that if he could not afford an attorney one would be appointed to represent him before questioning. See Miranda v. Arizona, 384 U.S. 436, 16

L.Ed.2d 694, 88 S.Ct. 1602, 10 Ohio Misc. 9, 36 Ohio Ops 2d. 237, 10 ALR.3d 974 (1966). On the record in this case, we would grant certiorari and set case for oral argument.

In any event, the imposition and carrying out of the death penalty in the case constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Gregg v. Georgia, ante, at 227, 49 L.Ed.2d 859, 96 S.Ct. 2909 (Brennan, Jr., dissenting); id., at 231, 49 L.Ed.2d 859, 96 S.Ct. 2909 (Marshall, J., dissenting). We would therefore grant certiorari and vacate judgment in this case insofar as it leaves undisturbed the death sentence imposed.

Gary Eldon ALVORD, a/k/a Paul Robert Brock, a/k/a Gary Eldon Venczel, Appellant,

v.

STATE of Florida, Appellee.

No. 57810.

Supreme Court of Florida

April 9, 1981

Rehearing Denied April 16, 1981.

PER CURIAM.

This is an appeal by the appellant, Gary Eldon Alvord, from a denial of post-conviction relief. Alvord was convicted in 1974 ofthree counts of first-degree murder for the strangulation of three women.

This is the third time this cause has been before this Court for review. An abbreviated chronology of the judicial proceedings is as follows.

The appellant was convicted of the murder charges on April 9, 1974. On September 17, 1975, this Court affirmed those convictions in its decision reported in Alvord v. State, 322 So.2d 533 (Fla.1975). Appellant thereupon sought review by certiorari to the United States Supreme Court, which was denied on July 6, 1976. Alvord v. Florida, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226, rehearing denied, 429 U.S. 874, 97 S.Ct. 195, 50 L.Ed.2d 157 (1976).

In his first collateral attack upon this conviction, appellant filed a motion for reduction of sentence under Florida Rule of Criminal Procedure 3.800(b) on November 29, 1976. The trial court denied the motion, finding it was without jurisdiction. Appellant then sought review of this action by petition for writ of mandamus, which was denied by this

Court in an unreported order on March 10, 1977.

The instant case arises from a second collateral attack upon the convictions, commenced on October 6, 1978, by filing a motion for post-conviction relief under the provisions of Florida Rule of Criminal Procedure 3.850, to which two supplements were filed. Consideration was delayed by these supplements and by appellant's pro se motion that his counsel withdraw. Appellant contends in his motion that:

(1) The trial court failed to respond to appellant's pro se request to have the public defender removed as counsel and have private counsel appointed.

(2) Trial counsel was incompetent because he did not file a notice of intent to claim insanity as a defense.

(3) The trial court erred by failing to instruct the jury on its own initiative

that appellant had a past history of mental illness, had previously been adjudicated insane, and should be presumed insane until such presumption was overcome by proof beyond every reasonable doubt.

(4) Counsel on the initial appeal was incompetent for failing to raise the following issues: (a) whether the trial court erred in setting aside its order sending appellant to a state institution for observation to determine his sanity; (b) whether the trial court erred in allowing Dr. Ames Robey to examine defendant and testify regarding defendant's mental condition; and (c) whether the trial court erred in allowing Dr. Robey to testify regarding defendant's past criminal history during the sentencing phase.

(5) He was denied an adequate psychiatric examination on the question of

his sanity on the date of the offenses.

(6) The interrogation of appellant by a Michigan detective was contrary to the principles set forth in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), because the detective neglected to read appellant the warnings as printed on the police form and failed to have appellant execute a written waiver of his constitutional rights.

(7) The death penalty has been administered and applied in a manner inconsistent with the principles in State v. Dixon, 283 So.2d 1 (Fla.1973), and Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

(8) The death penalty in Florida has been and is being applied pursuant to a practice which discriminates on the grounds of sex and poverty.

(9) Prosecutors and courts employ the death sentence as a penalty for the exercise of a defendant's right to a jury trial by a regular and uniform practice of declining to seek or impose the death sentence when the defendant pleads guilty although those cases are factually indistinguishable from those in which the defendant pleads not guilty and is sentenced to death after a jury trial.

(10) The imposition of the death sentence in this case is cruel and unusual because of all the relevant facts, including appellant's lengthy history of mental illness.

(11) Section 921.141, Florida Statutes (1973), is a matter of judicial practice and procedure and consequently violates article V, section 2(a), of the Florida Constitution.

(12) The death penalty is unconstitutional as applied to appellant because it is administered arbitrarily and discriminatorily to punish the killing of white persons as opposed to black persons.

(13) It was error for the trial court to fail to excuse for cause a venireman who indicated he felt everyone convicted of first-degree murder should receive the death penalty. The venireman was later excused peremptorily by appellant.

(14) The death sentence was imposed although none of the aggravating circumstances found to support the death sentence were alleged in the indictment and none were found to exist beyond a reasonable doubt.

(15) The consideration of mitigating circumstances was impermissibly restricted by the trial judge, contrary to the standards of Lockett v. Ohio, 438 U.S.

586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

After an evidentiary hearing and a clearly exhaustive review of the record, the trial judge denied this petition for post-conviction relief. The trial judge recognized that the principal assertion was directed to the competency and effectiveness of counsel at both trial and appellate levels. In his extensive order, the trial judge made the following specific findings:

> Defendant had committed an offense in 1967 in the State of Michigan involving the kidnapping and rape of a young girl. He was tried before the Court without a jury and on the 12th day of May, 1970 was found not guilty of those offenses by reason of insanity and he was committed to the Michigan Department of Mental Health. He escaped from the Ionia State Hospital in Michigan on January 24th, 1973, came to Florida, and on June 17th, 1973 committed the three murders for which he was subsequently convicted and sentenced to death

The Court appointed the Public Defender's Office to represent the Defendant and although he made several requests for appointment of private counsel, each of which was denied by the Court, he was ultimately represented in the trial of this cause by Thomas Meyers, an Assistant Public Defender. The Defendant did not object to Thomas Meyers, Esquire individually, but he objected to being represented by the <u>office</u> of the Public Defender .... This was in response to an inquiry by Mr. Meyers to determine if the Defendant objected to Mr. Meyers individually with the intention of requesting the Public Defender to appoint another Assistant to represent the Defendant if that was the basis of the Defendant's objection .... The Court had no authority to appoint anyone other than the Public Defender unless there was a conflict of interest involved. The Court even suggested to Mr. Meyers that if he felt that due to the difficulty he was encountering at that point in representing the Defendant that the Public Defender's Office could file an appropriate motion to be relieved and that the Court would consider the same. This is reflected by the portion of the transcript contained in the Defendant's appendix beginning on page 43.

"THE COURT: I would appreciate that. As far as—are you making a motion to discharge your counsel? Are you doing that now?

THE DEFENDANT: Yes sir. I have no faith in any persons representing the Public Defender's Office.

THE COURT: Well, I am going to let you take this up with the Public Defender, as far as—you might accommodate him in filing a written motion, Mr. Meyers, if you so desire. The Court may, since this is such a serious offense where three first degree murders are involved, as a precautionary matter, and in no way reflecting on your competency, because I have seen you try many cases, the Court may consider appointing him private counsel.

MR. MEYERS: I would not object, your Honor.

THE COURT: Well, I don't want you to take this as a castigation of your character or your ability to try cases, because I have seen you try many cases before me and other courts, and I have no doubt of your ability. But you might accommodate [sic] him in filing such a motion, and the Court may consider giving him private

> counsel. Of course, I can't guarantee him that the private counsel, his opinion of the private counsel may be even as bad or worse than that he has of you at the present. I can't control that."

Thereafter this apparent dissatisfaction with Mr. Meyers was apparently resolved as is reflected by the colloquy contained in Defendant's appendix at page 60:

> "MR. MEYERS: I would state into the record that I have advised, as the attorney for the defendant, that he do cooperate with the two court appointed psychiatrists, and that his refusal to talk with the doctors is strictly on his own initiative and not at all prompted by any advice or suggestion by me.
>
> Is that correct, Mr. Alvord? You have come to this decision on your own not to talk with the psychiatrists[?]
>
> THE DEFENDANT: The court gave me the impression I would have another lawyer. So, I considered myself without a lawyer.

MR. MEYERS: Well, did I talk with you on the 9th of this month, subsequent to your appearance in Court last week?

THE DEFENDANT: Yes.

MR. MEYERS: And did you fully cooperate with me then to the extent that you could and at that time concurred that I would by [sic] your lawyer?

Other than this one factor, (refusal to be examined by the two court appointed psychiatrists) Judge, he was very cooperative."

This cooperation between the Defendant and Mr. Meyers obviously continued throughout the balance of the proceedings before the trial Court and after sentencing. In a letter directed to Dr. Ames Roby [sic] dated January 5th, 1975 the Defendant's relationship with Mr. Meyers was stated as follows:

"Tom Meyers and I still correspond. He sure is a good guy. He's always trying to help in what ways he can and he really has no reason to. I

seldom ask for anything but he lets me know that he's willing."

The Defendant seems to have a penchant for "firing" his attorney. After his Motion for Post Conviction Relief was filed in this cause the Court received a pro-se document dated the 27th day of November, 1978 in which the Defendant stated "Said Gary E. Alvord on this date wishes/request [sic] of this Honorable court to drop his appeal and all attorneys/or persons assisting in said appeal." This pleading was directed to the representation by the Defendant's present counsel who are unquestionably competent and dedicated to the Defendant's cause. Thereafter, by document dated the 12th day of February, 1979 the Defendant withdrew his pro-se pleading.

The Court finds that the Defendant ultimately consented to being represented

by Assistant Public Defender Thomas Meyers, that he fully cooperated with Mr. Meyers in the preparation of the case for trial (other than submitted to examination by the court-appointed psychiatrists and that the trial Court did not commit error in failing to appoint private counsel to represent the Defendant.

On the issue of trial counsel's asserted incompetence for not filing a notice of intent to claim insanity as a defense, the trial court found:

> As stated in the Defendant's Motion for Post Conviction relief, trial counsel was aware of the Defendant's history of mental problems. On March 5th, 1974, Mr. Meyers requested copies of the Defendant's medical history from the State of Michigan and included therein a consent to the release of such information executed by the Defendant. Trial counsel was aware of the Defendant's adjudication of insanity and that he was presumed to remain incompetent until adjudicated otherwise .... The record is

> replete with various pre-trial motions filed by Defendant's trial counsel which reflect adequate preparation and knowledge of the law applicable to the issues involved.

The Court appointed Dr.'s [sic] Gonzalez and Sprehe to conduct a psychiatric examination of the Defendant and scheduled a competency hearing to be held on the 12th day of October, 1973. At that hearing Dr.'s [sic] Gonzalez and Sprehe both advised the Court that the Defendant refused to answer any of their questions or to communicate with them in anyway [sic]. Mr. Meyers advised the Court that upon being contacted by Dr. Sprehe he immediately went to the jail and talked with the Defendant and Mr. Meyers remained of the opinion that the Defendant did need to be examined .... Thereafter the State made arrangements for Dr. Ames Roby, Director of the Center for Forensic

Psychiatry in the State of Michigan to come to Florida and examine the Defendant. He did so and testified as to the Defendant's competency to stand trial on the 4th Day of January, 1974. At that hearing Dr. Roby testified that he knew the Defendant Gary Alvord quite well, he had examined the Defendant the preceding afternoon, he first met the Defendant on November 13th, 1969 for an admission evaluation, he was familiar with the Defendant's psychiatric or mental history, the Defendant conversed with him quite freely the preceding afternoon, he understood his role as a Defendant in this case, was aware that he was charged with three counts of murder in the first degree, he was more than ordinarily aware of legal procedures, he knew that he was facing the death penalty and was concerned, but felt that there was really

no evidence against him. Dr. Roby testified that he talked with him about the insanity defense and in his opinion any reluctance on the part of the Defendant to cooperate would be just that—it would not be in any way based upon mental illness and that there was no mental illness or decease [sic] that would prevent or preclude him from aiding and assisting his counsel. Dr. Roby testified that in his opinion the Defendant was competent to stand trial.

At the conclusion of the hearing the following colloquy took place between the Court and counsel.

> "THE COURT: Mr. Meyers, in view of the fact that this original motion was made by the defense to have the defendant examined, and upon the appointment by the two psychiatrists, the defendant saw fit not to cooperate with them. Has there been any change in the attitude of the defense

as to whether or not the defendant intends to cooperate with the doctors?

MR. MEYERS: I talked with him earlier, but let me see what his attitude is now.
(Mr. Meyers conferred with the defendant.)

MR. MEYERS: He indicated he doesn't, will not cooperate with any psychiatrists. I still recommend that he do so.

THE COURT: Do you still wish to continue on your motion to have him examined?

MR. MEYERS: Yes, I do. He's going counter to my opinion and legal advice now.

THE COURT: Well, the Court is bending over backwards to try to accommodate the defendant in all his motions. And one of the motions was that he be examined by two qualified psychiatrists here in our Court, and I have granted that motion and doing everything within the Court's power to give the defense and the Court the benefit of any mental condition this man may be suffering from. But if the defendant does not desire to cooperate under these conditions and the defense of insanity is not going to be raised in this

case, I see no reason we can't go to trial." ...

At that hearing the Court re-appointed Dr. Gonzalez and Dr. Sprehe to make another attempt to examine the Defendant. At the hearing held on January 11th, 1974 these two court-appointed psychiatrists testified that the Defendant had again refused to be examined by either of them. The record of that hearing also reflects that the Defendant had been further examined by Dr. Ames Roby after the previous hearing and the Assistant State's Attorney furnished the defense counsel and the Court with a copy of Dr. Roby's medical report prepared subsequent to his second examination of the Defendant, and the Court found the Defendant competent to stand trial. Subsequently, on the 8th day of February, 1974 another competency hearing was held

and at that hearing Dr. Sprehe testified that the Defendant had finally permitted him to conduct a psychiatric examination on the 6th day of February, 1974 and that in his opinion the Defendant did understand the charge against him and was able to assist counsel in the preparation of his defense....

The Defendant's trial counsel obtained copies of his medical reports from the State hospital in Michigan which reflect that in the opinion of the psychiatrists there—particularly Dr. Ames Roby and Dr. Birzgalis that the Defendant in August 1972 was no longer psychotic and that he had never at any time been overtly psychotic . . . that it was questionable that he was ever psychotic and that he was hostile, defiant and manipulative but not overtly psychotic .... Defense counsel also had access to the medical report

furnished by Dr. Ames Roby after his examination of the Defendant in the Hillsborough County jail in which he stated that the Defendant in his opinion was not insane under Florida law ("M'Naughten [sic] Rule") and also it was Dr. Roby's opinion that the Defendant was sane at the time he allegedly committed the three murders for which he was charged. The Defendant denied having committed these murders, refused to be examined by court-appointed psychiatrists on the issue of his competency at the time of the commission of the offense even after having been advised that he would not be permitted to claim the defense of not guilty by reason of insanity unless he submitted to such examination. He was competent to stand trial and therefore was competent to make the decision which he made even though it was against the advice

of trial counsel. It is obvious that he did not want trial counsel to assert this defense and trial counsel was well aware that should such a defense be asserted that the psychiatrists from the State of Michigan who were very familiar with the Defendant and his medical and mental history would testify that in their opinion the Defendant was sane on June 17th, 1973, the date of the offenses for which he was on trial. As observed by Judge Rawlins, trial counsel was experienced and capable and he was not called as a witness at the evidentiary hearing granted on the Defendant's Motion for Post Conviction Relief. It is obvious to the undersigned based upon full review of the trial transcript and the appendix to the Defendant's motion that trial counsel had fully advised himself of this possible defense and that the same was at

most tenuous—probably fruitless—and quite possibly would weaken the Defendant's asserted defense that he had not committed the offenses for which he was on trial. The Court finds that Davis vs. Alabama, 596 F.2d., 1214 (5th Cir. 1979) is not applicable. In Davis it was obvious that he had committed the offense for which he was charged—he pleaded not guilty by reason of insanity— his only possible defense, but trial counsel had not properly prepared that defense. Here, Mr. Meyers had fully explored that defense, was fully cognizant of the continuing presumption of insanity which arose by virtue of the Defendant having been found not guilty by reason of insanity in Michigan in 1970 and that the laws pertaining to insanity differed between the State of Michigan and the State of Florida What was defense counsel's duty to

rescue his client from his own voluntary acts? The Defendant would not follow Mr Meyers's [sic] suggestion that he submit to the Court ordered psychiatric examinations and it is obvious that trial counsel did everything within his power and his ability to convince the Defendant to do otherwise. There is a presumption that counsel is competent and this presumption must be overcome by the Petitioner in order for an ineffective assistance of counsel claim to lie. McQueen vs. Swenson, 498 F.2d, 207, 216 (8th Cir. 1974). The Defendant has failed to overcome that presumption.

This Court has attempted to delve behind the scenes by review of the voluminous material furnished at the evidentiary hearing to ascertain whether the trial counsel, either by inaction or through ill taken action, failed to meet

the standards of a reasonable, competent and devoted advocate as set forth in Freedman v. U. S., 588 F.2d, 1010 (5th Cir. 1979) and the Court finds that the Defendant's trial counsel was competent and devoted to the Defendant's cause.

The Defendant also claims that the trial Court erred in failing to intrust [sic] the jury sua-sponte [sic] that the Defendant had a past history of mental illness and had previously been adjudicated insane and was presumed insane until such presumption was overcome by proof beyond every reasonable doubt that the Defendant was in fact sane at the time he allegedly committed the offenses for which he was on trial. This ground for post conviction relief is also without merit. No proof of the Defendant's prior adjudication of insanity had ever been submitted to the Court and no such defense

was raised. A Defendant has the burden of establishing a plea of insanity by showing that he was legally insane when he committed the criminal act. Hixon v. State, (DCA 1964) 165 So.2d., 436. The trial Court is only required to instruct the jury on issues properly raised. Since the Defense did not choose to assert the defense of insanity it would have been improper for the trial Court to have instructed the jury on that issue.

The trial court concluded that it had:

> considered the other grounds contained in the Defendant's Motion for Post-Conviction relief and finds that the same are either without merit, have been formerly disposed of adversely to the Defendant in the appeal of this cause, Alvord v. State, (Fla. 1975) 322 So.2d 533, or they are not a proper ground for a motion for post conviction relief.

The principal assertion by appellant is that he was denied effective assistance of trial counsel because his counsel was unable to convince him to plead not guilty by reason of insanity. We find the record clearly sustains the finding of the trial judge and shows that the original trial counsel competently, diligently, conscientiously, and effectively represented the appellant. Counsel did all that could be done to provide appellant with effective representation and a fair trial, given the facts and circumstances of this cause. In our view, the representation provided appellant met the standard for effective assistance of counsel articulated by this Court in Knight v. State, 394 So.2d 997 (Fla.1981).

The other issue which warrants discussion concerns the testimony of the psychiatrist, Dr. Robey, at the sentencing

stage of the proceedings. The decision of Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979), cert. granted, 445 U.S. 926, 100 S.Ct. 1311, 63 L.Ed.2d 758 (1980), relied on substantially by the appellant, was decided subsequent to our initial review of this cause and, in our view, is not applicable. Smith held that statements made to a psychiatrist appointed to examine the defendant could not in that specific case be used in aggravation in the sentencing proceeding. We find that Smith does not apply because the issue of the propriety of Dr. Robey's testimony was raised in the initial appeal before this Court, although on another theory of law, and rejected in our original opinion on the merits. 322 So.2d at 539. Postconviction relief is not available for a reappeal or a review or to raise issues that could have been raised on the initial

appeal. Adams v. State, 380 So.2d 423 (Fla.1980); Sullivan v. State, 372 So.2d 938 (Fla.1979); Spenkellink v. State, 350 So.2d 85 (Fla.), cert. denied, 434 U.S. 960, 98 S.Ct. 492, 54 L.Ed.2d 320 (1977). Further, the Smith decision is not a change of law that warrants post-conviction relief under the doctrine we expressed in Witt v. State, 387 So.2d 922 (Fla.1980). Even if it were applicable, Smith is distinguishable since in Alvord's case the history and critical information related at the sentencing proceeding by the psychiatrist Robey were obtained in Michigan well before the commission of the instant criminal offenses and were proper to negate the argument of mitigating factors relating to mental condition.

We find the record fails to support the allegation that appellate counsel was

incompetent because he did not properly present the legal issue of appellant's competency and the testimony of the psychiatrist. The ineffectiveness of appellate counsel cannot be based upon the failure of counsel to assert a theory of law which was not at the time of the appeal fully articulated or established in the law. In our view, the appellant was provided with effective assistance of counsel on the initial appeal of this cause.

The remaining issues are without merit and have been disposed of by this court in previous proceedings or could have been raised in the initial appeal.

The order of the trial judge denying postconviction relief is affirmed.

It is so ordered.

SUNDBERG, C. J., and ADKINS, BOYD, OVERTON, ENGLAND, ALDERMAN and McDONALD, JJ., concur.

Gary Eldon ALVORD, a/k/a Paul Robert Brock, a/k/a Gary Eldon Venczel, Petitioner,

v.

Louie L WAINWRIGHT, Secretary, Florida Department of Corrections, Respondent.

No. 81 366 Civ-T-BK

United States District Court. M.D. Florida, Tampa Division.

March 23, 1983.

On Motion to Alter or Amend Judgment May 5, 1983.

MEMORANDUM OPINION

KRENTZMAN, Senior District Judge.

Gary Eldon Alvord, a Florida state prisoner under sentence of death for a triple murder, petitions this Court for a writ of habeas corpus, 28 U.S.C. § 2254, attacking his conviction and sentence on numerous grounds.

In 1970, petitioner was tried for kidnapping and rape in Michigan, found not guilty by reason of insanity, and committed to the custody of the Michigan Department of Mental Health. In January 1973, Alvord escaped from Michigan's Ionia State Hospital and eventually came to Tampa, Florida. He was indicted on August 1, 1973 for the June 1973 murders of three women, and Thomas Meyers, Esquire, a part-time public defender in the Circuit Court for Hillsborough County, was appointed to represent him. The trial court found Alvord competent to stand trial. Alvord plead not guilty and took the stand at trial to present an unsupported alibi defense. The state presented circumstantial evidence, a statement made by Alvord upon his arrest, and the testimony of Alvord's girlfriend, to whom he had allegedly confessed the

crimes. Petitioner was convicted on all three counts of first degree murder on April 4, 1974. Later that day, the court held the sentencing phase, at which Dr. Ames Robey, a psychiatrist who had treated Alvord in Michigan, was the only witness. The jury returned an advisory sentence recommending the death penalty, and the judge sentenced Alvord to death.

The conviction and sentence were affirmed by the Florida Supreme Court on direct appeal. Alvord v. State, 322 So.2d 533 (Fla.1975), cert. denied, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976). Petitioner's motion for post-conviction relief pursuant to Rule 3.850, Fla.R.Crim.P., was denied by a state circuit judge on August 27, 1979,[1]

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[1] Petitioner first moved for reduction of sentence pursuant to Rule 3.800(b), Fla.R.Crim.P., on November 29, 1976. The motion was denied, and the

and that denial was affirmed by the Florida Supreme Court on April 9, 1981. Alvord v. State, 396 So.2d 184 (Fla.1981). Petitioner was scheduled to be executed on May 6, 1981.

Alvord petitioned this Court for habeas corpus and moved to stay his execution on April 21, 1981. The state's response was, and for the most part remains, that petitioner received a full and fair hearing in the state courts, and that the state court findings and conclusions must be presumed correct under section 2254(d), 28 U.S.C. This Court stayed petitioner's execution and denied the state's motion for judgment on the pleadings. Petitioner's motion for discovery on the issues of ineffective

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Supreme Court of Florida denied a petition for mandamus on March 10, 1977 (unreported).

assistance of counsel and inadequate psychiatric examination was granted, and the Court conducted an evidentiary hearing on those two grounds on May 13 and 14, 1982. Depositions of Drs. Sprehe and Gonzalez were received in evidence, and Dr Robey, trial counsel Thomas Meyers, and appellate counsel Richard Seymour each testified at the hearing The parties submitted pre-hearing, post-hearing, and final memoranda.

Alvord bases his petition on twelve grounds. Two of those grounds raise issues that have for some time been pending in the courts of appeals. On April 28, 1982, the Eleventh Circuit ordered rehearing en banc in Ford v. Strickland, 676 F.2d 434 (11th Cir.1982), the case presenting as an issue the constitutionality of the Florida Supreme Court's review of nonrecord material in the course of considering

capital appeals. The decision of the en banc court was released on January 7, 1983. 696 F.2d 804 (11th Cir.1983). Also, on May 14, 1982, Unit B of the former Fifth Circuit ordered rehearing en banc in Washington v. Strickland, 673 F.2d 879 (5th Cir. Unit B), rehearing granted, 679 F.2d 23 (5th Cir. Unit B 1982), a case presenting important issues underlying the claim of ineffective assistance of counsel asserted by petitioner herein.[2] The decision of the en banc court in Washington was rendered on December 23, 1982. 693 F.2d 1243 (5th Cir.1982). Resolution of this petition while Ford and Washington v. Strickland were pending would have been premature.

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[2] Decision of Unit B of the Former Fifth Circuit bind this Court. County of Monroe v. Department of Labor, 690 F.2d 1359 (11th Cir. 1982); Stein v. Reynolds Security, 667 F.2d 33 (11th Cir. 1982).

I. INEFFECTIVE ASSISTANCE OF COUNSEL

A. *Representation at Trial*

Petitioner raised his ineffective assistance claim on state collateral review pursuant to Rule 3.850, Fla.R.Crim.P. In denying petitioner's motion, the state court made certain findings of historical fact which this Court generally presumes correct, 28 U.S.C. § 2254(d), but the conclusion of the state court that petitioner received effective assistance of counsel is not to be presumed correct under 2254(d). Whether counsel has rendered effective assistance is a mixed question of law and fact, requiring this Court to apply sixth amendment principles to the historical facts of the case. Sumner v. Mata, 455 U.S. 591, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982); Cuyler v. Sullivan, 446 U.S. 335,

341-42, 100 S.Ct. 1708, 1714-15, 64 L.Ed.2d 333 (1980); Sullivan v. Wainwright, 695 F.2d 1306, 1308 (11th Cir. 1983); Young v. Zant, 677 F.2d 792, 798 (11th Cir.1982); Harris v. Oliver, 645 F.2d 327, 330 (5th Cir.1981).

The state court found, in addition to the facts recited above, that petitioner's trial counsel, Mr. Meyers, "was aware of [Alvord's] adjudication of insanity and that [Alvord] was presumed to remain incompetent until adjudicated otherwise." State v. Alvord, No. 73-1398 (Cir.Ct. August 27, 1979) (order denying post-conviction relief) (hereafter, Rule 3.850 Order).[3] The collateral review court also found that Mr. Meyers moved the trial court on several occasions to

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[3] The Rule 3.850 Order appears in Volume Six of Respondent's Composite Exhibit One.

appoint Drs. Sprehe and Gonzalez to examine his client and that counsel tried in vain to persuade Alvord to cooperate. Alvord did not want to raise the insanity defense, however, and refused to cooperate each time the doctors were appointed to examine him. Finally, the court stated that "no proof of [Alvord's] prior adjudication was ever submitted to the Court and no such defense was raised." Rule 3.850 Order at 10. This Court presumes correct each factual finding made by the state court, with the single exception of its finding that no proof of the Michigan adjudication was submitted to the trial court.[4] Nevertheless,

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[4] In denying petitioners motion for post-conviction relief, the state court concluded that Mr. Meyers "fully explored" the insanity defense. Rule 3.850 Order at 9. Such statements are more than findings of historical fact; they amount instead to the court's conclusions leading to its holding that Alvord received effective

additional facts not inconsistent with the state court's findings are relevant to petitioner's sixth amendment claim.

1. *Background and Trial.*

Petitioner was in and out of mental hospitals in Michigan since the age of 13; his mother also suffered from mental illness. He was charged with the kidnapping and rape of a ten-year-old girl in 1967, and spent more than two years in a mental institution before being declared competent to stand trial. In 1970, he was adjudicated not guilty by reason of insanity by a Michigan judge after a bench trial.[5] Alvord was institutionalized and,

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assistance of counsel. As such, they do not have section 2254(d)'s presumption of correctness.

[5] During the period in question, Michigan applied a broader standard for determining insanity than did Florida. Florida applied the M'Naghten test: whether the defendant understood the

in January 1973, he escaped from the Ionia State Hospital in Michigan. The murders were committed in Florida in June 1973, and Alvord was indicted on August 1,1973.

Mr. Meyers was appointed to represent petitioner about two weeks after the

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nature of the act and that it was wrong at the time of the offense. Camp v. State, 149 So.2d 367 (Fla.App. 1963). Michigan applied both the M'Naghten and irresistible impulse tests: whether the defendant could control his actions at the time of the offense. The Michigan judgment holding Alvord not guilty by reason of insanity does not state the ground on which it was based At evidentiary hearing, petitioner suggested that it was based on the M'Naghten standard. An entry in Alvord's medical record shows that the psychiatrist who testified at the Michigan trial considered Alvord not to know right from wrong, I Medical Appendix 58, and Dr. Robey stated that he knew from discussions with the testifying doctor that such was the basis of the adjudication. See Trial Rec. at 1156. Florida law apparently gives full effect to a foreign adjudication without regard to the foreign state's test for insanity. Hixon v. State, 165 So.2d 436 (Fla.App. 1964). See note 16, infra.

indictment was returned.[6] Mr. Meyers had tried some fifteen or twenty felony cases to a jury at the time of his appointment, but he had tried none in which an insanity defense was raised. Meyers Depo. at 69. This was one of the first capital cases tried in the Thirteenth Judicial Circuit under Florida's revised death penalty statute. Mr. Meyers was assigned three first degree murder cases during 1973, and was in trial in his first such case in the fall of that year. The attorney first saw his client in September 1973 for about fifteen minutes. Alvord refused to talk to counsel other than to ask him to collect all the evidence he could and to come

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[6] The system then in effect provided for two part-time public defenders who shared the cases assigned to each judge. The benefits of that system were familiarity and cooperation; the expense was a lack of independent advocacy in some cases.

back. Meyers Depo. at 11. Mr. Meyers learned from the prosecutor that Alvord had suffered from mental problems since an early age, had spent many years in mental institutions, and had been adjudicated not guilty by reason of insanity in Michigan. Meyers' subsequent pre-trial contact with his apparently uncooperative client was primarily at court hearings.

In early October, Mr. Meyers moved off the record for a mental examination of his client. See Trial Rec. at 164, 227. But see Trial Rec. at 4 (order to determine mental condition of defendant).[7]

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[7] For clarity, the Court will refer to the consecutively paginated trial transcript, including papers filed with the trial court and transcripts of pretrial hearings, as "Trial Rec." When the consecutive page numbers are difficult to discern, the Court will cite the transcript pages as well.

The Court will also occasionally refer to the deposition testimony of trial counsel, appellate counsel, and Dr. Robey. Such references are for illustrative

On October 9, 1973, the trial court directed that Alvord be examined by two court-appointed psychiatrists, Drs. Sprehe and Gonzalez. Both doctors attempted to examine Alvord, but he refused to talk to them without his attorney present. At a competency hearing on October 12, 1973, the doctors described Alvord's response, but could give no opinions as to his mental state. Trial Rec. at 129-32. Mr. Meyers informed the doctors and the court of Alvord's six-year history in mental institutions whereupon both Doctor Gonzalez and the prosecutor stated that in similar cases in Florida the defendant was sent to a state hospital for observation. The court continued the hearing until October 19, 1973, when it stated that the

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purposes only; all findings are based on the state court record or on testimony adduced at the evidentiary hearing. See 28 U.S.C. §2246.

prosecutor had suggested the defendant be sent to the state hospital for observation and that his Michigan records be obtained. Trial Rec. at 133-35. The prosecutor had also mentioned Dr. Robey as a psychiatrist who had treated Alvord for several years in Michigan.[8] The hearing was continued until November 2, 1973, when the court announced its order committing Alvord to the Florida State Hospital for observation and examination. Trial Rec. at 136-37; see Trial Rec. at 10 (Order of Commitment). A month later, on December 6, 1973, the court set aside its commitment order without a hearing, having been told by the state hospital that the court had no authority to commit Alvord for

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[8] Dr. Robey testified at the sentencing hearing that he first saw Alvord in Michigan in November 1969, Trial Rec. at 1144, and that he saw him "more or less continuously from 1969 up until the time of his escape in 1973." Id. at 1168.

observation. Trial Rec. at 14 (Order Setting Aside Commitment); see Trial Rec. at 140. About the middle of December, Mr. Meyers learned from the prosecutor that Alvord had not gone to the mental hospital. He did not move to have his client committed for observation until March 26, 1974, a few days before trial.

At the invitation of the state,[9] Dr. Robey came to Florida on January 3, 1974 to examine Alvord; it was the doctor's understanding that the court and both counsel had requested the examination. Trial Rec. at 161-63. Alvord was surprised to see Dr. Robey, complained that he had not seen his attorney for three months, and talked to the doctor for several hours. On January 5, 1974, the court had a

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[9] Rule 3.850 Order at 5; see Trial Rec. at 15 (Dr. Robey's Report, January 9, 1974).

hearing at which Mr. Meyers learned for the first time that Dr. Robey had examined his client. Trial Rec. at 138-74; Meyers Depo. at 30-31. Meyers objected to the lack of notice, Trial Rec. at 168, but Dr. Robey was allowed to testify at the hearing that his examination of Alvord led him to the opinion that petitioner was indeed competent to stand trial. The doctor also testified that the Michigan courts had referred Alvord for examination some five times over the years during which he had supervised Alvord's mental treatment, that Alvord had escaped from a Michigan mental institution, and that his illness was of a type that could suddenly recur or go into long remissions. He stated that he knew more about Alvord than any other doctor in Michigan, but gave Mr. Meyers the names of two other treating psychiatrists. Trial Rec. at 160-61. The

trial court granted the state's motion, in which Mr. Meyers joined, for further mental examination by Dr. Robey to determine Alvord's sanity at the time of the offense, but stated that "if the defendant continues to refuse to talk to [Drs. Sprehe and Gonzalez], then the Court has no alternative but to deny any defense of insanity that may be raised in this case." Trial Rec. at 167.[10] Just before the hearing ended, Alvord moved the court to discharge Mr. Meyers as his counsel, stating he had "no faith in any persons representing the Public Defender's

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[10] Later, the judge made the same observation: You know, you can't have your cake and eat it too. You either got to go one way or the other. You either want to be examined to determine if you have a mental defense or you don't want to be examined. If he doesn't want to be examined and he is not going to present any defense of insanity in this case, I am sure that the State is ready for trial. Trial Rec. at 169.

Office." Trial Rec. at 171. The court responded by letting Alvord "take this up with the Public Defender .... You might accommodate him by filing a written motion, Mr. Meyers, if you so desire." Trial Rec. at 171-72; see Trial Rec. at 188-89.[11] Thereafter, Alvord apparently asked Mr. Meyers not to file such a motion. Meyers Depo. at 34.

Dr. Robey examined Alvord later that day for slightly over two hours and wrote a letter to the court and counsel from Michigan on January 9, 1974, giving his opinion that under Florida's M'Naughten standard, Alvord was criminally responsible at the time of the offense. Trial Rec. at 15 (opinion letter of Dr.

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[11] See also Trial Rec. at 27 (Alvord's January 22, 1974 handwritten motion to discharge the public defender; denied by the court); Trial Rec. at 195-99.

Robey). On January 10, 1974, the court again directed that Alvord be examined by the court-appointed psychiatrists. Trial Rec. at 17. At a competency hearing on January 11, 1974, Dr. Sprehe gave a qualified opinion that Alvord was competent to stand trial; the doctor was uncertain because he had been able to spend less than ten minutes with petitioner, who was still uncooperative. Trial Rec. at 175. Dr. Gonzalez stated no opinion because Alvord had only spoken to him for three to five minutes. The court found Alvord competent to stand trial: "I have no alternative under the circumstances but to presume, first of all, that the defendant is competent to stand trial until I am shown otherwise, and that the presumption is now even strongly enhanced by the psychiatric report of Dr. Robey. So, I will adjudicate

the defendant competent to stand trial." Trial Rec. at 189.

On February 5, 1974, with a February 25 trial date approaching, the court issued a third order, again directing the court-appointed doctors to try to examine Alvord.[12] At hearing on February 8, 1974, Dr. Sprehe, having spent fifteen minutes with Alvord, testified that in his opinion Alvord was competent to stand trial. Trial Rec. at 200-10. Dr. Gonzalez testified a week later that he still was without an opinion because he had again found Alvord uncooperative; he suggested that Alvord be committed for observation. Trial Rec. at 211-22. Neither doctor stated an opinion about Alvord's sanity at the time of the offense. The following colloquy between

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[12] This time, the court's order indicates that it was issued on defendant's motion. Trial Rec. at 58.

the court and Mr. Meyers took place at the February 15, 1974 hearing:

> The Court: [H]e failed to cooperate with the doctors. He then through his attorney requested that I give him another opportunity. He evidently did cooperate with one doctor. But now refused to with this doctor.
>
> Mr. Meyers: The problem here, Judge, he was up in Michigan been adjudicated incompetent.
>
> The Court: I don't know that.
>
> Mr. Meyers: There is a legal presumption that a person is, once adjudicated, is incompetent until adjudicated otherwise.
>
> The Court: I have no knowledge of this. There has been nothing shown to this Court that he has ever been adjudicated incompetent on the basis of any document or testimony. This Court doesn't have that before it. And until such time as the Court has something of that nature before it, I have to presume the defendant to be competent
>
> Mr. Meyers: Okay. Well, I have no further questions, Judge.

Trial Rec. at 21-17. The Court again declared Alvord competent to stand trial.

On the prosecutor's motion, trial was continued from February 25 to April 1, 1974. On March 26, 1974, Mr. Meyers filed a notice of intent to claim insanity, now inexplicably absent from the trial record.[13] He also filed a motion to

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[13] The original notice of intent to claim insanity was filed as Respondent's Exhibit Three at the evidentiary hearing in this Court on May 13, 1982. The document reads, in pertinent part:

> [T]he defendant intends to prove the defense of insanity by producing a certified copy of an ORDER OF COMMITMENT TO DEPARTMENT OF MENTAL HEALTH AS NOT GUILTY BY REASON OF INSANITY, filed in the Washtenaw County Circuit Court, State of Michigan, on June 3, 1970, a copy of which is attached hereto and made a part hereof.
>
> Inasmuch as defendant has previously been adjudicated incompetent, he is legally presumed to remain incompetent until adjudicated otherwise.

transfer Alvord to a state hospital, to which motion he attached the Michigan adjudication of insanity and order of commitment. The motion was denied. See Trial Rec. at 71-75. Mr. Meyers moved to dismiss the indictment on March 28, 1974, citing legal grounds ranging from the age of those serving on the indicting grand jury to the unconstitutionality of the death penalty. Trial Rec. at 78.

Trial began on April 1, 1974. As part of its strong case against Alvord, the state introduced a statement made by petitioner to a detective upon his arrest in Michigan for theft; Alvord apparently stated that he was not a thief, he was a rapist. Trial Rec. at 922. On direct examination, Mr. Meyers asked Alvord to

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(typeface in original). The attached referred to in the notice is a part of Exhibit Three.

explain that statement:

> Mr. Meyers: Well, did you make the statement that he said you made, though?
>
> Alvord: Probably did, yes.
>
> Mr. Meyers: And why did you say that?
>
> Alvord: Well, then, again—can I ask somebody a question here?
>
> Mr. Meyers: No. Just go ahead and answer the question. Why did you say that statement to him.
>
> Alvord: Because I was acquitted for kidnap and rape previously. Maybe—
>
> Mr. Meyers: For what reason?
>
> Alvord: By reasons of insanity.
>
> Mr. Meyers: All right. Is that what you were referring to?
>
> Alvord: Yes.
>
> Mr. Meyers: And were you at all referring to any murders in Tampa?
>
> Alvord: Definitely not.

Trial Rec. at 975-976.

The fact that Alvord had previously been found not guilty of kidnapping and rape by reason of insanity and the fact that he escaped from a Michigan mental hospital in 1973 arose at several other points during the trial. Mr. Meyers moved for a mistrial on the morning of the third day of trial, arguing that a newspaper article had appeared that morning describing "Mr. Alvord's acquittal previously by reason of insanity on charges of kidnap and statutory rape," and his subsequent "escape from the hospital up in Michigan in January of 1973." Trial Rec. at 735. Alvord testified, as set out above, that he had been "acquitted" "by reasons [sic] of insanity." On cross-examination, the prosecutor quibbled with Alvord's use of the word acquitted: "Isn't that rather not guilty because of your insanity, rather than an acquittal of

not guilty?"[14] Trial Rec. at 979. He brought out the fact that Alvord had escaped from the mental hospital before coming to Florida, Trial Rec. at 980, and, when questioning petitioner about a gun he had allegedly sold immediately after the killings, the prosecutor commented on an "[e]scapee from a mental hospital walking

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[14] Mr. Meyers later objected to the prosecutor's quibble and moved for a mistrial:

> I would like to move for a mistrial on the grounds that the prosecution did and was allowed to go into the matter of the defendant's record or finding of not guilty by reason of insanity for the rape and kidnapping up in Michigan. It's my intention that the matter should have been left there. But the prosecution pressed forward and also got the defendant to try to explain that even though he was acquitted of this, that he was, in fact guilty of it and subsequently found [sic-note] guilty because of insanity.

Trial Rec. at 1004.

around with a gun like that." Trial Rec. at 981.

Mr. Meyers did not request an instruction on the presumption of insanity because he "wasn't able to develop the insanity defense the way it . . . should be developed because of the lack of cooperation with [A]lvord." Meyers Depo at 49. The jury returned verdicts of guilt on all three counts.

2. Ineffective Assistance of Counsel.

The sixth amendment guarantees to criminal defendants the effective assistance of counsel; that is, of an attorney reasonably likely to render and rendering reasonably effective assistance given the totality of the circumstances. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Washington v. Strickland, 693 F.2d 1243,

1250 (5th Cir. Unit B 1982) (en banc); Washington v. Watkins, 655 F.2d 1346, 1355 (5th Cir.1981), cert. denied, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982); Herring v. Estelle, 491 F.2d 125, 127 (5th Cir.1974). The standard remains the same whether counsel was retained or appointed. Cuyler v. Sullivan, 446 U.S. 335, 344-45, 100 S.Ct. 1708, 1716, 64 L.Ed.2d 333 (1980). In order to succeed on a claim of ineffective assistance of counsel, a federal habeas petitioner must prove his entitlement to relief by a preponderance of the evidence. Washington v. Strickland, 693 F.2d at 1250; United States v. Killian, 639 F.2d 206, 210 (5th Cir.), cert. denied, 451 U.S. 1021, 101 S.Ct. 3014, 69 L.Ed.2d 394 (1981).

The major ground of petitioner's ineffective assistance claim is Mr. Meyers' failure to investigate and present

Alvord's insanity defense. Constitutionally effective counsel must conduct a "reasonable amount of pretrial investigation." Washington v. Strickland, 693 F.2d at 1251; see Washington v. Watkins, 655 F.2d at 1355-56. The standard governing the amount of pretrial investigation that is reasonable cannot be articulated with precision, for it "necessarily depend[s] upon a variety of factors including the number of issues in the case, the relative complexity of those issues, the strength of the government's case, and the overall strategy of trial counsel." Washington v. Strickland, 693 F.2d at 1251; Washington v. Watkins, 655 F.2d at 1357. The Fifth Circuit has noted, however, that its admonition against assessing counsel's performance "through the finely ground lenses of 20/20 hindsight" "is especially compelling in

reviewing claims . . . grounded in allegations of inadequate investigation and preparation." Washington v. Watkins, 655 F.2d at 1356. Instead, the reasonableness of counsel's assistance must be judged "'from the perspective of counsel, taking into account all the circumstances of the case, but only as those circumstances were known to him at the time in question.'" Washington v. Strickland, 693 F.2d at 1251 (quoting Washington v. Watkins, 655 F.2d at 1356).

The en banc Washington v. Strickland court recently analyzed a failure-to-investigate claim by describing in five paradigms those situations that might underlie such a claim. 693 F.2d at 1252-58. The court began with perhaps the clearest breach of the duty to investigate: cases in which trial counsel perceived only one plausible line of

defense for his client, but failed to conduct a substantial investigation thereof. Id. at 1252-53. "[P]ermissible trial strategy can never include the failure to conduct a reasonably substantial investigation into a defendant's one plausible line of defense." Id. at 1252; e.g. Gomez v. Beto, 462 F.2d 596 (5th Cir. 1972).

Against this clear case, the court compared two other paradigms that are relevant to this petition. It focused on the necessary content of a "reasonably substantial investigation" by positing its second class of cases, holding to the now routine conclusion that effective defense counsel " 'is not required to pursue every path until it bears fruit or until all conceivable hope withers.'" 693 F.2d at 1253 (quoting Lovett v. Florida, 627 F.2d 706, 708 (5th Cir. 1980)). "Rather,

attorneys must conduct a substantial investigation which includes 'an independent examination of the facts, circumstances, pleadings and laws involved.'" Id. at 1253 (quoting Rummel v. Estelle, 590 F.2d 103, 104 (5th Cir.1979)).

Finally, the court identified the role of trial strategy in cases of this kind by describing as its fourth paradigm cases in which "counsel fail[ed] to conduct a substantial investigation into one plausible line of defense because of his reasonable strategic choice to rely upon another plausible line of defense at trial." Id. at 1254. Ideally, an attorney should investigate all possible defenses before choosing to exclude some at trial, but achievement of that ideal is not required by the sixth amendment. "Often, counsel will make a choice of trial

strategy relatively early in the representation process after conferring with his client, reviewing the state's evidence, and bringing to bear his experience and professional judgment." Id. (footnote omitted). The distance between ideal and constitutional minimum is significant under Washington v. Strickland, however: "Whereas a strategy chosen after full investigation is entitled to almost automatic approval by the courts, a strategy chosen after partial investigation must be scrutinized more closely. " Id. at 1255.

This petition presents a difficult variation on the paradigms set out in Washington v. Strickland. The facts as trial counsel knew them suggested two possible defenses: the available insanity defense, which Meyers considered Alvord's only real hope, and the unsupported alibi,

which Alvord consistently asserted and to which he eventually testified at trial. Primarily because of Alvord's opposition to an insanity defense, counsel went to very little effort to investigate that defense before trial. The major issue underlying Alvord's claim of ineffective assistance, then, is whether and to what extent a criminal defendant's expressed unwillingness to raise a particular defense absolves his attorney of the responsibility to investigate and present that defense.

The record reveals that Mr. Meyers did very little independent investigation of Alvord's potential insanity defense. He obtained only a small portion of his client's voluminous medical record, and made no effort to have even that small part interpreted by a qualified psychiatrist. Meyers Depo. at 29, 42-43.

He made no effort to contact anyone in Michigan, where Alvord spent 25 of his 26 years; specifically, he never contacted the doctors who had treated his client at the Ionia State Hospital. Id. at 57. After Alvord refused for the first time to speak to the two court-appointed psychiatrists, counsel chose not to be present at the several subsequent examinations, even though he knew that Alvord's uncooperativeness was on the stated ground that his attorney was not present. He also made no effort until a few days before trial to seek reconsideration of the trial court's ex parte December 6, 1973 order vacating the order of commitment. In the absence of an independent investigation, counsel neither explored the helpful facts and opinions to which Dr. Robey might have testified nor brought out the substantial qualifications

that the doctor himself placed on his opinion that Alvord was sane at the time of the offense.[15] In short, Mr. Meyers undertook virtually no investigation of the one defense he considered viable in Alvord's case, choosing instead to comply with Alvord's request that he put petitioner on the stand and proceed with an alibi defense.

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[15] As developed since trial, Dr. Robey could have disclosed substantial qualifications on his opinion of Alvord's insanity, had he been asked. Indeed, Dr. Robey's deposition is replete with qualifications and reservations. He testified that his opinion was rendered without adequate information; he knew next to nothing of the details of the crime or of Alvord's relationship to the victims. Robey Depo. at 56-58. He stated that the circumstances in which he examined Alvord in January 1974 were inadequate to support a firm opinion, and that defense could never spoke to him in substance about his opinion. Id. He also indicated that Alvord's post-arrest statement was unknown to him when he rendered his opinions, but that such would have been important. Id. at 63-64. In short, Dr. Robey's "opinions were weaker than [he] wanted them to be. Id. at 58.

The question presented in this claim, as framed by the court in Washington v. Strickland, is whether trial counsel made a reasonable choice based upon reasonable assumptions when he rejected the uninvestigated insanity defense in favor of Alvord's alibi:

> The choice by defense counsel to rely upon certain lines of defense to the exclusion of others before investigating all such lines is a strategic choice.
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> * * *
>
> A strategy chosen without the benefit of a reasonably substantial investigation into all plausible lines of defense is generally based upon counsel's professional assumptions regarding the prospects for success offered by the various lines. The cases generally conform to a workable and sensible rule: when counsel's assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions, counsel need not investigate lines of defense

> that he has chosen not to employ at trial.

693 F.2d at 1254-55 (citations and footnotes omitted). To resolve that question, the Court must briefly review the strength of the state's case and of the alternative defenses and must consider the impact of Alvord's refusal to proceed with an insanity defense upon his attorney's exercise of professional judgment.

The state presented a strong case that petitioner had committed the acts of which he was charged. Zelma Hurley, Alvord's girlfriend, testified that he had confessed committing the crimes to her the morning after they allegedly took place. Trial Rec. at 753-54. The prosecution also introduced testimony concerning certain items—a cigarette lighter, jewelry, a watch, and some cash—allegedly

stolen from the victims. Hurley testified that Alvord had some of these items just after the killings took place, Trial Rec. at 750, 757-59, and Terri Williams, another friend of Alvord, stated she saw them in his possession in Detroit about one week after the crimes occurred. Trial Rec. at 879-82. The items were apparently never found. Trial Rec. at 853 (testimony of Detective John W. Reed). Other circumstantial evidence was introduced further tying Alvord to the crime scene. Finally, as described above, the state introduced a statement made by petitioner upon his arrest in Michigan for theft to the effect that he was not a thief, he was a rapist. Trial Rec. at 922. See section IV, infra.

Against this strong case, Alvord's sole defense was an uncorroborated alibi. He took the stand and testified that from

nine to midnight on the night of the killings he was with Zelma Hurley at the home of one Joe Duncan, that they left around midnight and spent the next hour to hour and a half at a bar, the Sportsman's Lounge, and that they returned to their apartment about 1:15 a.m. Alvord stated that he had seen a friend, Jeanine Brautigan, at the lounge that night, but she did not testify. After dropping Hurley off at the apartment, Alvord assertedly went to the Davis Island Hotel to find a friend. Unable to locate the friend, he spent another hour to hour and a half at a bar adjoining the hotel and returned home, where he passed out in the car until daybreak. He also stated that he had consumed a substantial quantity of beer and had smoked a certain amount of marijuana during the course of the

evening. No other witness testified in support of this alibi defense.

The alternative defense, of course, was that of insanity. Had he chosen to do so, Mr. Meyers could easily have raised the presumption of incompetence and insanity available to Alvord by virtue of his prior adjudication in Michigan.[16] See Parkin v. State, 238 So.2d 817 (Fla.1970); Horace v. Culver, 111 So.2d 670 (Fla.1959); Wells v. State, 98 So.2d 795 (Fla.1957); Livingston v. State, 383 So.2d 947 (Fla.App.1980); Hixon v. State, 165 So.2d 436 (Fla.App.1964). The state would thereby have been put to the burden of

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[16] Respondent argues without citation that a foreign adjudication cannot raise the presumption of insanity in a Florida court, especially if the foreign adjudication was based upon a standard for determining insanity different from that applied in Florida. But see Hixon v. State, 165 So.2d 436 (Fla. App. 1964). This issue was never squarely faced in the original trial. See also note 5, supra.

proving beyond a reasonable doubt that Alvord was sane at the time of the offense.[17] Horace v. Culver; Parkin v. State. The apparent importance of this presumption is diminished somewhat by the fact that one who has never been

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[17] The presumption raised by Alvord's prior adjudication applied not only to the determination of competency to stand trial, but to petitioner's sanity at the time of the offense as well. In Hixon, the defendant had been adjudicated insane in Ohio in 1958. He escaped and fled to Florida, where he murdered his former wife. Upon motion for a sanity hearing, Hixon was transferred to the Florida State Hospital for examination by court-appointed doctors. The court adjudicated him incompetent to stand trial on the basis of the doctors' reports and Hixon was treated for three years at the state hospital. Thereafter, Hixon was found "sane enough" to stand trial, and was convicted. The District Court of Appeal reversed that conviction, however, holding that the presumption of insanity at the time of the offense was never overcome by the state. Thus, neither the fact that the proper adjudication was from another state nor the trial court's finding that Hixon was competent to stand trial dissolved the state law presumption that Hixon was insane at the time of the offense.

adjudicated insane need only produce evidence raising a "reasonable doubt as to sanity" in order to put the state to its burden of proving sanity beyond a reasonable doubt. See Byrd v. State, 297 So.2d 22 (Fla.1974) By affording defendants the presumption of insanity, Florida has simply provided an easy avenue by which those who have been adjudicated insane might raise the "reasonable doubt as to sanity" that ordinarily puts the prosecutor to his heavy burden of proof on the issue.

Resolution of Alvord's ineffective assistance claim necessarily involves consideration of Mr. Meyers' reasons for choosing not to assert the largely uninvestigated insanity defense. Washington v. Strickland, 693 F.2d at 1254-55. Counsel testified both before this Court and in his deposition that his

major reason was Alvord's unwillingness to raise the defense or cooperate in its preparation and presentation. This is not a case in which the accused was willing to assert the defense, but was of little help in its preparation. In Davis v. Alabama, 596 F.2d 1214 (5th Cir.1979), vacated as moot, 446 U.S. 903, 100 S.Ct. 1827, 64 L.Ed.2d 256 (1980),[18] the court chided the

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[18] Davis was vacated as moot by the Supreme Court. Alabama v. Davis, 446 U.S. 903, 100 S.Ct. 1827, 64 L.Ed.2d 256 (1980). Justice Powell has warned that even after such an action by the Court, the appellate decision in question is "likely to be viewed as persuasive authority if not the governing law" of the circuit. County of Los Angeles v. Davis, 440 U.S. 625, 646 n. 10, 99 S.Ct. 1379, 1391 n. 10, 59 L.Ed.2d 642 (1979) (dissenting). Nevertheless, the Fifth Circuit developed the general requirement that defense counsel conduct an independent investigation in cases dating back to 1970, e.g., Clark v. Blackburn, 619 F.2d 431, 432 (5th Cir. 1980); Caraway v. Beto, 421 F.2d 636 (5th Cir. 1970), and continues to cite and rely upon the Davis decision. See Beavers v. Balkcom, 636 F.2d 114 (5th Cir. 1981).

state of Alabama for attempting to exonerate Davis' attorneys by suggesting that Davis "might have given them more leads, more evidence of his insanity .... " 596 F.2d at 1219. "[A] defendant's failure to disclose certain information to his attorney is not necessarily, or obviously, or even probably the defendant's fault." Id. Alvord was much more than simply reticent in his statements to Mr. Meyers; in the face of the contrary advice of counsel, petitioner stated repeatedly that he was unwilling to assert the defense of insanity at all. The wishes of a client on a matter of this kind cannot be disregarded by defense counsel. In deciding among various defenses, an attorney must be mindful of his client's willingness to proceed on a particular theory, for he may reasonably assume at the very least that the lack of

cooperation from an unwilling client would doom the defense—he may also reach the more weighty conclusion that the decision whether to plead insanity is for the accused, not his attorney. See American Bar Association, Code of Professional Responsibility EC 7-7, 7-8 (1969); American Bar Association, Project on Standards for Criminal Justice, Standards Relating to the Defense Function § 5.2 (App. Draft 1971). To say that defense counsel may at least consider his client's wishes in deciding whether to enter a plea of insanity is not to say that the attorney may lightly reject a potential defense of insanity, raising as it does the possibility that the accused's decision-making faculties may be clouded.

See Davis, 596 F.2d at 1220.[19] The sixth amendment requires that defense counsel do more than simply obey the possibly pathological wishes of an accused; counsel must, however, take those wishes into account when deciding whether to raise the insanity defense.

A second consideration was the damning opinion of Dr. Robey that petitioner was sane at the time of the offense. Although he might have discovered qualifications on that opinion upon inquiry, Mr. Meyers was not

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[19] Mr. Meyers assumed that Alvord's decision not to assert his insanity defense was based on the fact that "he didn't want to go back to institutions." Meyers Depo. at 42. Dr. Robey testified, on the other hand, that petitioner's refusal to raise the defense was rooted in fears that he would be considered mentally ill, "particularly because of the identification with his mother's mental illness." Robey Depo. at 43. The doctor did nevertheless opine that Alvord was competent to stand trial. See Trial Rec. at 148-51.

unreasonable in assuming that this opinion, rendered by the psychiatrist who knew Alvord best, would effectively undermine an insanity defense.

Other of Mr. Meyers' concerns may have been more perceived than real. Like the Federal Rules, Florida's Rules of Criminal Procedure did and do require that a defendant who intends to raise the defense of insanity file notice of that intent; in the absence of such a notice, a defendant may not introduce evidence of his insanity. Fla.R.Cr.P. 3.210(e) (now at Fla.R.Crim.P. 3.216(b)); see Fed.R Cr.P. 12.2. But the Florida rule did permit exceptions for good cause shown. Fla.R.Cr.P. 3.210(e) (altered version currently in force, Fla.R.Cr.P. 3.216(f)). Parkin v. State, 238 So. 2d 817 (Fla.1970), was also not necessarily an insurmountable obstacle. Parkin held that

a defendant who raises an insanity defense must cooperate with doctors for the prosecution or the court, reasoning that such a defendant ought not be able to refuse to meet with all but his own doctors. But Alvord did cooperate with Dr. Robey, who was sent for by the state and was its key witness at the sentencing hearing, and with Dr. Sprehe—at least long enough on two occasions for that doctor to advance the opinion that Alvord was competent to stand trial.

Petitioner does not contend that his attorney failed to advise him to raise the insanity defense and to cooperate more fully with the court-appointed psychiatrists. Cf. Brennan v. Blankenship, 472 F.Supp. 149 (W.D.Va.1979). To the contrary, the record reveals that counsel repeatedly so advised his client. Mr. Meyers could have, and

probably should have, done more to investigate the insanity defense of his obviously unstable defendant. But the sixth amendment was not offended when counsel, knowing the essential facts underlying the insanity defense and aware of Dr. Robey's damaging opinion, acceded to his client's stated and adamant objections to asserting that defense. Ethical considerations aside, his assumptions that success on an insanity theory would have been impossible without Alvord's cooperation was reasonable under the circumstances, and cannot now be second-guessed.

Having found other aspects of petitioner's claim of ineffective assistance of counsel to be without merit, this Court concludes that Alvord received constitutionally adequate assistance of counsel before and at trial.

B. Representation at Sentencing.

1. The Sentencing Hearing.

Petitioner also claims that trial counsel failed to provide constitutionally effective assistance at the sentencing phase. Alvord's sentencing was conducted during the evening of April 4, 1974, the same day the jury returned its verdict of guilt. The state called Dr. Robey. Although Mr. Meyers called no witnesses, he testified before this Court that he had planned to call Dr. Robey had the state not done so, for counsel knew that the doctor would testify to two statutory mitigating factors.

After stating his professional qualifications and the general circumstances in which he had come to know Alvord, Dr. Robey testified to certain details of the 1967 Michigan kidnapping and statutory rape of which Alvord was

charged. Trial Rec. at 1153 55.[20] He stated that Alvord had been tried to a judge and found not guilty by reason of insanity on the basis of another psychiatrist's testimony that Alvord did not know right from wrong. Dr. Robey's view of Alvord's condition at the time of the Michigan crime was somewhat different, however; he stated at the sentencing hearing in this case that he considered Alvord to have known right from wrong at the time of the Michigan crimes, but to have been acting under irresistible impulse—the second prong of Michigan's insanity standard.[21] The doctor went on to recount Alvord's commitment to Ionia State Hospital and his two subsequent escapes. He also described two minor

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[20] Mr. Meyers' hearsay objection was overruled. Trial Rec. at 1152-53.

[21] See note 5, supra.

offenses of which Alvord had been convicted.[22] Dr. Robey next described his examinations of Alvord in early 1974, and recited again his opinions that Alvord was competent to stand trial and that he knew right from wrong at the time of the Florida crimes. After explaining Alvord's mental illness in psychological terms, the witness then testified to two mitigating factors: he stated his opinion that Alvord had been "under a great deal of emotional stress" at the time of the offenses, Fla.Stat. § 921.141(6)(b) (1973), and that his capacity to conform his behavior to the requirements of law was "clearly impaired," id. § 921, 141(6)(f). See Trial Rec. at 1178. His direct testimony concluded with his statement that Alvord

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[22] The parties later agreed that each of these were misdemeanor convictions. Trial Rec. at 1197-98.

was dangerous to women. On cross-examination by Mr. Meyers, Dr. Robey described in fair detail the history of Alvord's mental illness, extending back to the age of thirteen. He stated that Alvord was married and had a child age six. He reiterated his view that Alvord had been under great emotional stress and that he lacked capacity to conform his conduct to the requirements of law. He then stated in quite compelling terms his belief that Alvord's mental illness was not such as to prevent rehabilitation.

After closing arguments, the jury returned an advisory verdict recommending the death penalty, and on April 9, 1974, the trial judge sentenced Alvord to death and entered findings in support of that sentence as required by section 921.141(3), Fla.Stat.

2. Ineffective Assistance of Counsel.

Petitioner contends that counsel rendered ineffective assistance at the penalty phase because: first, he failed to collect and present in mitigation Alvord's extensive medical record indicating his history of mental illness; second, he failed to cross-examine Dr. Robey effectively due to his general lack of familiarity with Alvord's psychiatric history; third, he failed to produce as "rebuttal witnesses" other doctors, including Alvord's treating psychiatrists in Michigan; and fourth, he failed to produce character witnesses to humanize Alvord in the eyes of judge and jury.

One accused of capital crime has a sixth amendment right to effective assistance of counsel at the penalty phase, as well as during certain pretrial proceedings and at the trial itself. See

Stanley v. Zant, 697 F.2d 955 (11th Cir.1983); Washington v. Strickland; Proffitt v. Wainwright, 685 F.2d 1227, 1245 (11th Cir.1982); Davis v. Alabama, 596 F.2d at 1217. Essentially the same standard applies when assessing counsel's performance at the sentencing hearing as applies in gauging his effectiveness at trial, that of "reasonably effective assistance." Proffitt, 685 F.2d at 1245. The Constitution does not require errorless counsel, and although its requirements are theoretically no more strict in capital cases than in other criminal cases, "'the seriousness of the charges against the defendant is a factor that must be considered in assessing counsel's performance.'" Stanley, at 962 (quoting Proffitt, 685 F.2d at 1287).

Upon detailed review of the record, this Court concludes that the adequacy of

counsel's performance at and in preparation for the sentencing hearing may have fallen below constitutional requirements. His almost total failure to investigate the facts supporting mitigating circumstances simply cannot be overlooked.

First, as was true in connection with his investigation of the insanity defense, Mr. Meyers failed to seek out and interview Alvord's treating psychiatrists in Michigan. He made no effort to obtain Alvord's complete medical history, nor did he retain an independent psychiatrist to review the small portion of the medical record that he did have. It may well be repeated that counsel never chose to appear with one of the court-appointed psychiatrists at one of their attempted examinations of Alvord, even though he knew that Alvord's stated objection to

being examined was that his attorney was not present. Largely these same failings in Mr. Meyers' investigation were considered in assessing his performance in preparation for and during the trial. Specifically, this Court concluded that counsel's failure to investigate matters relating to the insanity defense did not render his representation of petitioner constitutionally ineffective in light of Alvord's absolute unwillingness to pursue that defense. That element is absent with regard to the sentencing phase, however. Indeed, respondent has suggested no assumption to the Court, reasonable or otherwise, that might explain counsel's failure to investigate Alvord's medical history for the purposes of the sentencing hearing. Mr. Meyers' tactic was to rely on those mitigating factors that relate to the mental condition of the accused at the

time of the offense, but he made no effort to obtain or present any facts relating to those mitigating circumstances other than the conclusions of Dr. Robey brought out on direct examination and accentuated on cross.

Second, counsel made no effort to contact or interview anyone who might have testified as a character witness in Alvord's behalf. Cf. Proffitt, 685 F.2d at 1247-48. The Eleventh Circuit has now rejected the argument that counsel acts under an absolute duty to investigate and present mitigating character evidence in every capital case. See Stanley, at 958-62. Indeed, the Stanley court noted that to the date of that decision no panel of the Fifth or Eleventh Circuits had found ineffective assistance on the basis of defense counsel's failure to produce character witnesses at the penalty phase.

Id., slip op. at 1486. Mr. Meyers explained his failure to introduce character witnesses as the result of Alvord's "lack of communication" with his family. An attorney's responsibility to make an independent investigation is not discharged by his client's lack of communication with potential witnesses, see Davis, 596 F.2d at 1219, but this fact may reasonably lead counsel to assume that petitioner's family might not prove fertile ground in which to search for character witnesses. Moreover, reliance on general character witnesses may have proved somewhat inconsistent with counsel's chosen tactic to rely on petitioner's psychiatric condition in mitigation of sentence. See Stanley, at 966-70. The Supreme Court has emphasized in a recent line of cases the importance at the penalty phase of character evidence

and evidence of any personal circumstance that might lead the sentencer to be merciful. E.g. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). See Songer v. State, 365 So.2d 696, 700 (Fla.1978), cert. denied, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979). Such evidence is often critical to balance the inevitable impression of an accused's character left upon his conviction for murder. Although it is patently insufficient to explain counsel's inadequate investigation of Alvord's psychiatric history, Mr. Meyers' tactical choice to rely on the mitigating factors relating to the accused's mental condition may justify his failure to do more than he did in the way of investigating possible character witnesses.

The Court is prepared to conclude that counsel rendered constitutionally deficient representation by failing to undertake a reasonable investigation into Alvord's psychiatric history. It need not formally so conclude, however, for petitioner has shown no prejudice arising from any of the aspect's of Mr. Meyers' performance that were assertedly ineffective.

3. *Prejudice.*

Petitioner has offered the testimony of no independent psychiatrist available at the time who might have testified more favorably than Dr. Robey at sentencing.[23]

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[23] Petition did file the deposition of Dr. Francis Walls, a psychiatrist with the Florida State Prison System who come into contact with Alvord after his conviction. Dr. Walls did not testify at the evidentiary hearing. This Court has nevertheless read and considered Dr. Walls' deposition testimony.

A federal habeas petitioner must demonstrate his entitlement to relief by a preponderance of the evidence. Washington v. Strickland, 693 F.2d at 1250. Indeed, the major appellate decisions dealing with the necessary performance of counsel at sentencing have been predicated upon petitioner's introduction of evidence that might have been brought out upon adequate investigation. E.g.: Stanley; Washington v. Strickland. See Washington v. Watkins, 655 F.2d at 1363. Petitioner herein has simply not offered any evidence of psychiatric testimony that might have been revealed upon a more thorough investigation. Furthermore, although independent experts might have disagreed with Dr. Robey's view that Alvord was sane at the time of the offenses, they could have added nothing to Dr. Robey's testimony at sentencing, for that

testimony fully supported Alvord's position with regard to both of the mitigating factors that focus on mental condition. Fla.Stat. §§ 921.141(6)(b), .121(6)(f). The sentencing judge found these factors to have been established in this case. Trial Rec. at 97. Accordingly, even assuming that helpful testimony of independent experts might have been available, Mr. Meyers' failure to investigate and present it did not result in "actual and substantial disadvantage" to petitioner in the course of the sentencing hearing. Washington v. Strickland, 693 F.2d at 1262.

Similarly, the Court finds no prejudice arising from Mr. Meyers' failure to identify and produce character witnesses; again, petitioner has not indicated to this Court any such testimony that might have been revealed upon

adequate investigation. Accordingly, this Court concludes that counsel's failure to investigate possible character witnesses did not work to petitioner's "actual and substantial disadvantage." Id.

Petitioner having suffered no legally cognizable prejudice, this Court concludes that his claim of ineffective assistance of counsel at the sentencing hearing is without merit.

C. Representation on Appeal.

Petitioner's second ground for relief is that he was denied effective assistance of counsel on his direct appeal to the Florida Supreme Court.[24] Specifically,

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[24] Petitioner raised this claim on state collateral review on most of the grounds asserted before this Court. He has therefore satisfied the requirement of exhaustion of state remedies. 28 U.S.C. §2254(b). The conclusion of the state court in denying this claim does not warrant section 2254(d)'s presumption of

petitioner contends that appellate counsel, Richard Seymour, Esquire,[25] provided constitutionally deficient representation because he failed to raise five "significant issues which should have been brought to the reviewing court's attention." These issues were whether the trial court erred: first, by not "responding to petitioner's pro se plea to remove the public defender" as his attorney; second, by not instructing the

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correctness, for the constitutional effectiveness of appellate counsel, like that of trial counsel, presents a mixed question of law and fact. Sumner v. Mata, 455 U.S. 591, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982).

[25] It appears from Mr. Seymour's deposition and his testimony before this Court that his "assignment" to handle Alvord's appeal came about under unusual circumstances. Seymour Depo. at 6-8, 11, 37-41. Upon due consideration, the Court does not consider these circumstances to affect the ineffective assistance analysis; it is clear, however, that Mr. Seymour acted as appointed counsel.

jury sue sponte on the presumption of insanity; third, by setting aside its November 2, 1973 order committing petitioner for psychiatric examination; fourth, by allowing Dr. Robey to testify to Alvord's competency and sanity based on an examination made without notice to defense counsel and in violation of Alvord's fifth amendment privilege; and fifth, by allowing the doctor to testify at the sentencing hearing to certain prior crimes of which Alvord was not convicted and which were otherwise excludable. Although it may be unnecessary, each of these several contentions will be discussed in turn.

1. The Standard.

The level of effectiveness constitutionally required of appellate counsel has been considered far less

frequently than has that of trial counsel. The Supreme Court has stated in a slightly different context, however, that counsel on appeal must take "the role of an active advocate in behalf of his client." Anders v. California, 386 U.S. 738, 744, 87 S.Ct. 1396, 1400, 18 L.Ed.2d 493 (1967). Various courts of appeal, including those for the Fifth and Eleventh Circuits, have applied an analysis substantially similar to that applied in claims of ineffective assistance at trial. E.g. Mylar v. Alabama, 671 F.2d 1299 (11th Cir.1982); Mendiola v. Estelle, 635 F.2d 487 (5th Cir.1981). See Cuyler v. Sullivan, 446 U.S. 335, 344-45, 100 S.Ct. 1708, 1716, 64 L.Ed.2d 333 (1980). Typically, claims of ineffective assistance on appeal turn on counsel's complete failure to file or prosecute the appeal, e.g. Sullivan v. Wainwright, 695 F.2d 1306, 1309 (11th

Cir.1983); Mack v. Smith, 659 F.2d 23 (5th Cir.1981); Chapman v. United States, 469 F.2d 634 (5th Cir.1972); see Perez v. Wainwright, 640 F.2d 596 (5th Cir.1981), and appellate counsel ordinarily need not assert, on a properly perfected appeal, grounds that he reasonably considers meritless. Mendiola; Hooks v. Roberts, 480 F.2d 1196 (5th Cir.1973), cert. denied, 414 U.S. 1163, 94 S.Ct. 926, 39 L.Ed.2d 116 (1974); see Mylar, 671 F.2d at 1300 01 (appellate counsel must render "'reasonably effective performance.' ") (quoting United States v. Phillips, 664 F.2d 971, 1040 (5th Cir.1981)). This Court will therefore proceed to assess whether Mr. Seymour's advocacy fell below the standard of reasonably effective assistance when he failed to raise the various legal arguments listed by petitioner.

2. The Public Defender.

The first ground proposed by petitioner for finding ineffective assistance on appeal is easily disposed of: Alvord contends that appellate counsel should have raised the trial court's failure to remove the public defender as defense counsel. The state collateral review court found as a matter of historical fact that Alvord "ultimately consented to being represented by Assistant Public Defender Thomas Meyers ...." Rule 3.850 Order at 2. See also Alvord v. State, 396 So.2d at 188. This finding is fairly supported by the record, 28 U.S.C. § 2254(d)(8), which was certainly strong enough on this point to have lead reasonable counsel to decide not to raise the issue on appeal. See United States v. Young, 482 F.2d 993 (5th Cir.1973).

3. Sua Sponte Insanity Instruction.

Petitioner also contends that appellate counsel was ineffective because he did not raise the trial court's failure to instruct sue sponte on the continued presumption of insanity. The simple answer to this contention is that trial counsel, not the trial court, bears responsibility to raise defenses and to request instructions in accordance therewith. In a typical case, the trial judge cannot and should not be saddled with the duty to second-guess counsel's tactical choice of defenses and to instruct sue sponte on defenses that might have been raised. [18, 19] Petitioner cites In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), to the contrary. Winship held that due process "protects the accused against conviction except upon proof beyond a reasonable

doubt of every fact necessary to constitute the crime with which he is charged." Id. at 364, 90 S.Ct. at 1073. In the line of cases of which this aspect of Winship is part, the Supreme Court has articulated the circumstances in which due process is violated by placing upon a criminal defendant the burden of proving a particular fact. E.g. Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977) (no violation in defendant's burden to prove affirmative defense of "extreme emotional disturbance"); Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) (due process violated in requiring defendant to prove heat of passion to rebut presumption of murder); Leland v. Oregon, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952) (no violation of defendant's burden to prove insanity

beyond a reasonable doubt).[26] See also Mason v. Balkcom, 669 F.2d 222 (5th Cir. Unit B 1982) (violation in presuming intent to kill). No matter how a state designs its presumptions on the issue, insanity remains an affirmative defense unless the sanity of the accused is expressly defined as part of the crime charged Leland; see Walker v. Butterworth, 599 F.2d 1074 (1st Cir.), cert. denied, 444 U.S. 937, 100 S.Ct. 288, 62 L.Ed.2d 197 (1979); United States v. Greene, 489 F.2d 1145 (D.C.Cir. 1973), cert. denied, 419 U.S. 977, 95 S.Ct. 239, 42 L.Ed.2d 190 (1974). Florida's statute does not require proof of a defendant's sanity as

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[26] Although its continued vitality has been questioned in light of Winship, see W. LaFave & A. Scott, Criminal Law §8 at 48 (1972). Leland remains good law. See Rivera v. Delaware, 429 U.S. 877, 97 S.Ct. 226, 50 L.Ed.2d 160 (1976) (cited in Patterson).

an element of first degree murder, Fla.Stat. § 782.04(1)(a), and petitioner's appeal to due process principles in this regard therefore fails.[27] The trial court had neither procedural nor constitutional responsibility to raise the defense on his own.[28] This was precisely the reason Mr.

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[27] This Court need not consider the extent to which due process requires the trial judge to instruct sua sponte on each element of the offense.

[28] Petitioner cites Wider v. United States, 348 F.2d 358 (D.C. Cir. 1965), but Wider involved the trial court's ongoing obligation to raise and determine the accused's competency to stand trial. This Opinion should not be read to suggest otherwise, but competency to stand trial is an issue distinct from the substantive defense of insanity. A trial court must always consider the competency of a defendant to stand trial, see Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966); it need not raise sua sponte any substantive defenses that the defendant does not assert.

Cases such as Byrd v. State, 297 So.2d 22 (Fla. 1974), simply require an insanity instruction when the defense is asserted and the defendant introduces evidence thereon sufficient to raise a

Seymour did not raise the issue, Seymour Depo. at 35, and he certainly cannot be faulted for that decision.

4. *Refusal to Commit for Observation.*

Petitioner next contends that appellate counsel provided ineffective assistance by failing to raise the trial court's error in setting aside its November 2, 1973 order committing Alvord to the state mental hospital for observation. The trial judge set aside his commitment order because, apparently

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reasonable doubt as to his sanity. They do not require the trial court to raise the defense itself-that is up to the defendant and his attorney. Johnson v. State, 118 So.2d 234 (Fla.App. 1964), is also not to the contrary. That decision simply states the self-evident requirement that the trial court instruct correctly on the presumption of insanity; it cannot be read to obligate the judge to raise Alvord's defense for him.

after consulting with state agency officials, he became convinced that he was without authority to commit Alvord under the circumstances. Petitioner argues that he trial judge had that authority under Rule 3.210, Fla.R.Crim.P., that he erred in not exercising it, and that appellate counsel should have cited that error on appeal. Respondent contends that Rule 3.210 does not grant the authority to commit for determination of sanity, and that appellate counsel was prevented from raising the issue before the Florida Supreme Court by such cases as Wainwright v. Sykes, 433 U.S. 79, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

Respondent misunderstands the Supreme Court's holding in the three cases cited to this Court, Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); United States v. Frady, 456 U.S.

152, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982); Wainwright v. Sykes. Wainwright and Engle hold that a state habeas petitioner may not obtain federal collateral relief based on trial errors to which no required contemporaneous objection was made unless he can make the now familiar showing of cause and prejudice. Frady applied that principle to a movant under 28 U.S.C. § 2255. Whether Mr. &ymour could have raised this alleged error of the trial court on appeal before the Florida Supreme Court is entirely a question of state law.

The Florida Supreme Court, like most other appellate courts, adheres to the principle that it should not reach issues which the trial court did not have a "full and adequate opportunity to consider." In re Beverly, 342 So.2d 481, 489 (Fla.1977); see Dober v. Worrell, 401 So.2d 1322

(Fla.1981); Silver v. State, 188 So.2d 300, 301 (Fla. 1966). This contemporaneous objection rule is grounded in the familiar purpose of giving the trial court an opportunity to consider the issue in question. See Corbett v. Dade County Board of Public Instruction, 372 So.2d 971, 974-75 n. 3 (Fla.App.1979). In this case, however, the trial judge had ample "opportunity to consider" the commitment issue. Indeed, he considered it once in November 1973, when he committed Alvord, and again in December when he vacated the commitment order. Moreover, on March 26, 1974, Mr. Meyers moved, albeit belatedly, to transfer Alvord to a state hospital. It is clear, however, that Mr. Seymour considered this issue to be only arguably preserved for appellate review. In reaching this conclusion, counsel was under the mistaken impression

that Mr. Meyers had never moved to have Alvord committed. Seymour Depo. at 31-33; see Trial Rec. at 74 (Motion to Transfer Defendant to State Mental Hospital for Observation to Determine Sanity).

The law was notably unclear in 1973 and 1974 on the obligation—not to mention authority—of a Florida judge to order a criminal defendant committed for observation to determine his competency to stand trial or insanity at the time of the offense. The prevailing procedures at that time were in Rule 3.210, Fla.R.Crim.P., headed "Insanity." Subsection (a) dealt with what has come to be known as competence to stand trial. It provided that when, upon its or the defendant's motion, the trial court develops "reasonable ground to believe" that the defendant is incompetent, it must "immediately fix a time for a hearing to

determine the defendant's mental condition." See Fowler v. State, 255 So.2d 513 (Fla. 1971) (construing essentially identical predecessor to quoted section). In order to determine whether a defendant is competent to stand trial, the court was authorized to appoint up to three psychiatric experts to examine him and testify. If necessary, "the court may order the defendant taken into custody until the determination of his sanity [i.e. competence] can be made." Fla. R Crim. P. 3.210(d). See Lederer v. Stack, 294 So.2d 107 (Fla. 4th DCA 1974) (court must "fix a time" for competency hearing before defendant may be incarcerated under subsection).[29] If the defendant is found

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[29] The quoted provision for detaining a defendant is intended as an exception to Florida's bail requirements; it is not authority for the commitment order petitioner contends the trial court was empowered to issue. See Author's Comment

competent he proceeds to trial; if he is found incompetent, he is then committed "to the Division of Mental Health for hospitalization under the provisions of Fla.Stat § 394.467, F.S.A.," subject to continuing review. Fla.R.Crim.P. 3.210(a)(3); see Jackson v. Indiana, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972). The rule did not contain specific provision for commitment as a first step in determining competence to stand trial, nor did it expressly allow commitment to enable psychiatric examination of an accused's mental state at the time of the crime. See Fla.R Crim.P. 3.210(c).

Petitioner argues that the trial court was nevertheless constitutionally compelled to commit him for observation. One prong of this contention is that

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to Rule 3.110, reprinted in, Fla.R.Cr.P. 3.210, 33 Fla.Stat.Ann. (1975).

commitment was required in order to make a constitutionally adequate determination of Alvord's competency to stand trial. Years ago the Supreme Court settled the proposition that due process is violated by conviction of an accused while he is legally incompetent to stand trial. Bishop v. United States, 350 U.S. 961, 76 S.Ct. 440, 100 L.Ed. 835 (1956).[30] A decade later, the Court safeguarded that due process guarantee by a separate procedural due process right to a competency hearing whenever the facts or events before the trial court raise a "bona fide doubt" as to the defendant's

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[30] One is legally incompetent to stand trial when he lacks "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceeding against him." Dusky v. United States, 362 U.S. 402, 403, 80 S.Ct. 788, 789, 4 L.Ed.2d 824 (1960).

competency to stand trial. Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966); see Acosta v. Turner, 666 F.2d 949 (5th Cir. Unit B 1982). Several hearings were held in this case to determine petitioner's competence to stand trial, and this Court cannot say that the procedures undertaken by the trial court were insufficient under Pate. See Reese v. Wainwright, 600 F.2d 1085, 1090-92 (5th Cir.), cert. denied, 444 U.S. 983, 100 S.Ct. 487, 62 L.Ed.2d 410 (1979); Greenfield v. Gunn, 556 F.2d 935 (9th Cir.), cert. denied, 434 U.S. 928, 98 S.Ct. 413, 54 L.Ed.2d 288 (1977). The trial court was therefore not required by Pate to commit Alvord for observation.

The second prong of petitioner's constitutional argument is that commitment was required because it afforded "the best opportunity to determine the viability of

an insanity defense." Petitioner's Memorandum, March 10, 1982, at 30. Two court appointed psychiatrists tried several times to examine Alvord, but he refused each time on the stated ground that his lawyer was not present. Dr. Robey, an expert brought to Florida by the state and subsequently requested by the court to examine Alvord to determine sanity, succeeded in talking to Alvord for some two hours and concluded, although qualifiedly, that petitioner was sane under Florida's M'Naghten standard at the time of the offense. This Court can find no constitutional violation in the extent of expert psychiatric assistance provided by the state in this case. See United States ex rel. Smith v. Paldi, 344 U.S. 561, 568, 73 S.Ct. 391, 395, 97 L.Ed. 549 (1953); Payne v. Thompson, 622 F 2d 254, 255 (6th Cir.1980); cf. United States v.

Taylor, 437 F.2d 371, 383-84 n. 6 (4th Cir.1971) (Sobeloff, J., concurring and dissenting). See Section II, infra.

Thus, appellate counsel faced an issue only arguably preserved for appeal and of dubious legal merit. His decision not to raise such an issue cannot ground a finding of ineffective assistance. Mendiola.

5. *The "Estelle v. Smith" Issue.*

Petitioner's next asserted ground for finding appellate counsel ineffective is his failure to argue on appeal the trial court~s error in allowing Dr. Robey to testify at the sentencing hearing as to Alvord's mental condition on the basis of an examinatiOn made without notice to defense counsel and in violation of petitioner's fifth and fourteenth

amendment privilege.[31] The Supreme Court held in Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), that introduction of a court-appointed psychiatrist's testimony to prove a capital defendant's future dangerousness, based on information gleaned from a custodial examination of the accused who neither requested the examination nor introduced psychiatric evidence on the issue and who was not warned of his right to remain silent and that any statement he made could be used against him at sentencing, violated the rule of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602,

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[31] In discussing this asserted failing of appellate counsel, the Court will limit itself to counsel's failure to raise the Miranda violation. The next subsection of this Opinion involves Mr. Seymour's failure to attack on appeal the admission of certain factual information through Dr. Robey. See section IV, infra, on the substantive Miranda attack.

16 L.Ed.2d 694 (1966). The Smith court also held that the accused's sixth amendment right to counsel was infringed because defense counsel was given no notice of the psychiatric examination. Finally, the Smith decision is to be retroactively applied. Battie v. Estelle, 655 F.2d 692 (5th Cir.1981).[32]

Because the Smith issue arises in the posture of an ineffective assistance claim, this Court must decide whether counsel is to be charged with anticipating Smith's holding some six or seven years before the decision was rendered. See Proffitt v. Wainwright, 685 F.2d at 1248. The question is close. The opinion in Battie includes the familiar retroactivity analysis, and contains the Fifth Circuit's

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[32] Petitioner does not assert Smith as an independent ground for granting habeas relief in this case.

conclusion that "Smith did not establish a new principle of constitutional law because that decision merely applied already fixed principles to a new factual situation." Id. at 699. On the other hand, the Fifth Circuit declined to "fault" counsel for not anticipating the court of appears' decision in Smith, 602 F.2d 694, and therefore found effective assistance of counsel in Gray v. Lucas, 677 F.2d 1086, 1096 n. 9 (5th Cir.1982). See also Sullivan, 695 F.2d at 1309. Moreover, Mr. Seymour faced the then-recent decision in Parkin v. State, 238 So.2d 817 (Fla.1970), a case that could easily lead reasonable counsel to conclude that the Florida Supreme Court would not favorably receive a Miranda and sixth amendment attack on Dr. Robey's first examination of Alvord.

Several aspects of this case also indicate that Mr. Seymour cannot be faulted for not raising a Smith point on appeal. First, trial counsel failed to object to Dr. Robey's arguably Smith-violative testimony that petitioner would be dangerous to women in the future and that he was sane at the time of the Florida crimes. Trial Rec. at 1171-72, 1178-79.[33] Second, and more fundamentally, the Smith issue would not necessarily have succeeded on appeal. In Smith the psychiatrist who examined the accused, Dr. Grigson, testified on the basis of that examination alone. Thus, there was no question that his conclusions on future dangerousness were based on statements made during a custodial

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[33] Mr. Meyers did object to the lack of notice at the January 4, 1974 competency hearing.

examination without prior Miranda warnings or notice to counsel. Mr. Seymour faced quite a different circumstance: Dr. Robey had supervised Alvord's treatment for years prior to his escape in Michigan, and his contemporaneous examination of Alvord was in two sessions, the latter of which—on the specific question of petitioner's sanity at the time of the offense—was apparently in substantial compliance with the dictates in Smith. His testimony was therefore not based entirely, and may not have been based at all, on the first custodial examination.[34] Finally, the record indicates unequivocally that Mr. Meyers was eager for Dr. Robey to examine his client. Meyers Depo. at 31.

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[34] This Court does not hold that Smith was followed in this case; that issue is not presented by this petition and is therefore not before the Court.

In light of the problematic issue whether counsel is to be charged with foretelling Smith's rule, the trial attorney's failure to object to the questionable testimony, and the uncertain potential success of a Smith issue on appeal, this Court cannot conclude that Mr. Seymour rendered ineffective assistance in failing to raise the point.

6. Prior Crimes and Charges.

Finally, petitioner contends that Mr. Seymour should have raised the trial court's error in admitting Dr. Robey's testimony concerning two prior crimes of which Alvord had apparently been convicted and concerning the kidnapping and rape charge of which Alvord had been found not guilty by reason of insanity in Michigan. The capital punishment statute in effect in Florida at the time Mr. Seymour took

this appeal provided that "evidence may be presented [at the sentencing hearing] as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated" elsewhere in the statute. Fla.Stat. § 921.141(1) (1973). The enumerated aggravating circumstances included the fact that "the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." Id. § 921.41(5)(b). The mitigating circumstances, on the other hand, included the facts that "the defendant has no significant history of prior criminal activity," id. § 921.141(6)(a), that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance,"

id. 921.141(6)(b), and that "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." Id. § 921.141(6)(f).

Dr. Robey testified at sentencing to several matters now relevant. He stated that the last two quoted mitigating factors, extreme disturbance in subsection (b) and lack of capacity in subsection (f), existed in Alvord's case. Trial Rec. at 1178, 1188- 89. He described the circumstances surrounding the kidnapping and rape of which Alvord had been found not guilty by reason of insanity, id. at 1148-56, and stated his opinion that Alvord was sane under M'Naghten at the time of those crimes. Id. at 1159-60 He testified that Alvord had twice been convicted of crimes in Michigan, once for

malicious destruction of property and the other for reckless driving. Id. at 1165-67 Mr. Meyers objected to the doctor's testimony concerning the Michigan crimes, stating that his client had not been convicted of the kidnap and rape and that testimony about the other two crimes was hearsay.

Petitioner now raises several legal attacks on the admissibility of this testimony which he contends counsel should have pressed on direct appeal. First, he says the information conveyed by Dr. Robey was within the psychiatrist-patient privilege codified at that time at Fla.Stat. § 90.242 (1973). The short answer is that the trial court took considerable care to ensure that Dr. Robey testified only to matters surrounding the Michigan crimes of which he had knowledge independent of communications from Alvord.

Next, petitioner cites Parkin as grounding a possible argument on appeal. Parkin, decided over a decade before Smith, held that the fifth amendment rights of a criminal defendant who chooses to plead insanity were not violated when she was ordered by the trial court to cooperate with court-appointed psychiatrists. The court limited the use of such testimony: "[A]ny statements obtained from the patient by the doctor are used as evidence of mental condition only, and not as evidence of the factual truth which may be contained in them." Id. at 822. The answers to petitioner's contention that Mr. Seymour should have raised Parkin are twofold: first, the record reflects again the care of the trial judge in limiting Dr. Robey's testimony on the Michigan crimes to facts he knew from sources other than Alvord's statements; and second, Dr.

Robey certainly did not come to know of Alvord's criminal record in the course of the custodial examination he made in January 1974, and Parkin's limitations therefore would not apply. Thus, the decision not to raise these matters on appeal was a reasonable tactic.

Next, petitioner contends that Mr. Seymour should have argued that introduction of evidence relating to the Michigan crimes violated Florida's capital sentence statute. First, he assertedly should have urged that evidence of the two Michigan misdemeanor convictions be excluded because they were not within the statutory aggravating circumstance requiring conviction of prior capital felony or felony "involving the use or threat of violence to the person." Fla.Stat. § 921.141(5)(b) (1973). Respondent counters by stating that

evidence of these misdemeanors was relevant to rebut the statutory mitigating factor that "the defendant has no significant history of prior criminal activity." Id. § 921.141(6)(a).[35] Similarly, respondent states that Dr. Robey's testimony that Alvord was sane under M'Naghten at the time of the Florida crimes goes to rebut the two mitigating factors concerning mental state. Id. § 921.141(6)(b) and (f). Respondent's position may or may not be consistent with Florida law as it exists today, compare Maggard v. State, 399 So.2d 973, 977-78

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[35] Petitioner contends that the quoted mitigating factor is void for vagueness, citing Arnold v. State, 236 Ga. 534, 224 S.E.2d 386 (Ga. 1976). The Supreme Court considered the clarity of this and other language in the Florida statute in Proffitt v. Florida, 428 U.S. 242, 757-58, 96 S.Ct. 2960, 2969, 49 L.Ed.2d 913 (1976), concluding that it was facially constitutional. Mr. Seymour was no doubt prescient in choosing not to raise the point.

(Fla.1981) with Booker v. State, 397 So.2d 910, 918 (Fla.1981); see Henry v. Wainwright, 661 F.2d 56 (5th Cir.1981), vacated on other grounds, 457 U.S. 1114, 102 S.Ct. 2922, 73 L.Ed.2d 1326 (1982); Proffitt, 685 F.2d 1266 69 (adopting Henry's analysis), but Mr. Seymour certainly did not render ineffective assistance in choosing not to raise the issue at the time of the appeal.

Second, petitioner asserts that Mr. Seymour should have attacked introduction of evidence relating to the Michigan kidnapping and rape, of which Alvord was found not guilty by reason of insanity This testimony clearly should have been excluded. Alvord was not convicted of those crimes, and they were therefore not properly the subject of the sentencer's attention. Fla.Stat. § 921.141(5)(b) (1973); Perry v. State, 395 So.2d 170,

174-75 (Fla. 1981); Provence v. State, 337 So.2d 783 (Fla.1976). Mr. Seymour acted reasonably in not raising the issue on appeal, however, because the trial court did not find the aggravating circumstance of prior violent felony conviction, and was supported in his failure to find the mitigating "no significant history of prior criminal activity" by the evidence of prior misdemeanors. Trial Rec. at 97.

For the reasons stated, this Court concludes that Mr. Seymour's representation of Alvord on direct appeal was constitutionally adequate.

D. *Conclusion.*

Petitioner received constitutionally effective assistance of counsel at trial and on direct appeal. Mr. Meyers' performance fell below constitutional standards at the sentencing hearing, but

petitioner was not prejudiced thereby under the standard announced in the en banc Washington v. Strickland decision. Petitioner is therefore not entitled to habeas relief on the ground of ineffective assistance of counsel.

II. INADEQUATE PSYCHIATRIC EXAMINATION

Petitioner next argues, as a second independent attack on his conviction, that he received a constitutionally inadequate psychiatric examination in advance of trial.[36] The argument is based primarily on the proposition that the trial court was required under constitutional mandate to commit Alvord for observation in order

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[36] This issue was discussed earlier in the context of petitioner's claim of ineffective assistance of counsel on appeal. See section I(C)(4), supra.

to facilitate the development and presentation of an insanity defense.[37]

Indigent defendants are and must be entitled to the assistance of an expert when such is necessary to their defense. Bush v. McCollum, 231 F.Supp. 560 (N.D. Tex.1964), aff'd 344 F.2d 672 (5th Cir.1965) (per curiam); see Hoback v. Alabama, 607 F.2d 680, 682 n. 1 (5th Cir.1979); Pedrero v. Wainwright, 590 F.2d 1383 (5th Cir.1979). Cf. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); Gray v. Rowley, 604 F.2d 382 (5th Cir.1979). In Bush, the earliest case on point in the Fifth Circuit, the court held that due process was violated when the defendant was convicted over an insanity plea without

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[37] Petitioner also suggest that Pate was violated in this case. For the reasons stated in section I(C)(4), supra, that argument is rejected.

the assistance of a qualified psychiatrist and without expert evidence as to sanity. 231 F.Supp. at 565. Quite similarly, the court in Blake v. Zant, 513 F.Supp. 772 (S.D.Ga.1981), stated that "a defendant whose sanity at the time of the alleged crime is fairly in question has at a minimum the constitutional right to one psychiatric examination and opinion developed in a manner reasonably calculated to allow adequate review of relevant, available opportunity to utilize the analysis in preparation and conduct of the defense." Id. at 787.[38]

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[38] Petitioner also relies on United States v. Taylor, 437 F.2d 371 (4th Cir. 1971), but Taylor simply held that the Criminal Justice Act, 18 U.S.C.A. § 3006A (West Supp.1982), applicable to federal prosecutions, required a federal district court to appoint a psychiatrist to examine a defendant upon his request and showing of necessity, and that the statutory showing was made when the only other psychiatric opinion available was based on a "truncated" ten-minute interview.

This Court agrees with Judge Edenfield's holding in Blake: under appropriate circumstances, a defendant must be provided a psychiatric examination when such is necessary to a reasonable investigation of an insanity defense. That rule might be extended, as petitioner contends, to require commitment upon a showing that observation in an institutionalized setting is the only way to accomplish a reasonably adequate psychiatric examination of an accused. But this case presents no such circumstances, for Alvord was examined by a thoroughly qualified psychiatrist—one whom he trusted and who possessed intimate knowledge of his psychiatric history. The fact that Dr. Robey concluded that Alvord was sane at the time of the offense is wholly insufficient to entitle the accused to another opinion. Blake, 513 F.Supp. at

784 (and cases cited therein). Similarly, the fact that Dr. Robey states now, some eight years later, that his examinations of Alvord were made under adverse circumstances in no way entails the conclusion that the trial court was constitutionally bound to go further than it did in providing a psychiatric examination. The state judge knew only that two psychiatrists had tried unsuccessfully to examine Alvord and had suggested commitment and that Dr. Robey had performed an examination of Alvord adequate to ground a professional opinion. The constitution was satisfied.

Accordingly, habeas relief should be denied on this ground.[39]

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[39] The Court notes some unclarity as to whether petitioner effectively exhausted his available state remedies on this point, see Alvord, 396 So.2d at 191 (collateral review appeal), but need not pause on the matter in light of

III. USE OF UNDISCLOSED MATERIAL BY THE FLORIDA SUPREME COURT: THE BROWN ISSUE

Petitioner's third ground for relief is that "the Florida Supreme Court, since at least as early as 1975, has engaged in the continuing practice of requesting and receiving information concerning capital appellants which was not presented at trial and not a part of the trial record or record on appeal." Alvord cannot say whether such material was considered by the state court in deciding his appeal.

The constitutionality of the Florida court's consideration of these materials was considered and upheld in Brown v. Wainwright, 392 So.2d 1327 (Fla.), cert. denied, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981). The Eleventh Circuit

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respondent's waiver. Answer ¶11; see Hopkins v. Jarvis, 648 F.2d 981 (5th Cir. Unit B 1981); Messelt v. Alabama, 595 F.2d 247 (5th Cir. 1979).

has upheld the practice without condoning it. Ford v. Strickland, 696 F.2d 804, 809-11 (11th Cir. 1983) (en banc) (mandate stayed until March 1, 1983).

Accordingly, habeas relief on this ground should now be denied.

IV. MIRANDA

Petitioner next contends that Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), was violated when the officer who arrested him in Michigan was allowed to testify to Alvord's postarrest statement, "I'm a rapist, not a . . . thief." He contends that Miranda was violated because, first, the officer "neglected to read petitioner the warnings as printed on a police department form"—the record is unclear whether the officer informed Alvord of his right to have counsel appointed if he was indigent;

and second, Alvord never signed a written waiver of his fifth amendment privilege.

The officer, Detective Dufour, testified in the proffer that he told Alvord he was a police officer, that he did not have to say anything, that anything he said could later be used against him, and that he had a right to have an attorney. Trial Rec. at 921. Dufour also stated that Alvord did not request an attorney, that no one promised Alvord immunity or threatened or coerced him into making a statement, and that Alvord told him he understood his rights. Id. at 921-22. The detective later testified to the jury that upon being questioned about "another matter,"[40] Alvord had said, "I'm a rapist, not a ...

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[40] The trial court was properly careful not to let in evidence concerning this "other matter." Trial Rec. 925-27.

thief." Id. at 941. He described Alvord's explanation—"He said, 'I'm wanted for three murders in Florida'"—and stated that when asked whether he did it, Alvord responded "They have got to prove it." Id. at 942.

Introduction of this testimony did not violate Miranda. See North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979); Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974); see also 28 U.S.C. § 2254(d); Alvord, 322 So.2d 536-38 (direct appeal). Further, no specific factual material before this Court undermines the trial court's conclusion that the statement was made voluntarily and in full compliance with due process principles.

Habeas relief is therefore denied on this ground.

V. GENERAL ATTACKS ON THE SENTENCE OF DEATH

Petitioner next mounts several constitutional attacks on his sentence. His fifth ground for relief is that the death penalty is unconstitutional as applied in his case. To support that ground, he argues that "[d]eath sentences are imposed irregularly, unpredictably, and whimsically in cases which are no more deserving of capital punishment under any rational standard that considers the character of the offender and the offense, than many other cases in which sentences of imprisonment are imposed." Petition at 27. He also contends that "[t]he theoretical justifications for capital punishment are groundless and irrational in fact." Id. at 28. His sixth ground is that the sentence violated the equal protection clause because it is imposed

discriminatorily on the basis of sex and poverty. Ground nine also comprises an equal protection argument: Alvord contends the death penalty is imposed "arbitrarily and discriminatorily to punish the killing of white persons as opposed to black persons.[41] Finally, petitioner's seventh and eighth grounds are, respectively, that the potential for capital punishment is used in Florida to coerce guilty pleas from those accused of murder and that the death penalty was "too great" in this case.

Each of these arguments was resolved in Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir.1978). First, the Spinkellink court read several modern Supreme Court

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[41] Petitioner also finds a constitutional basis for this contention in the eighth amendment and the due process clause of the fourteenth amendment. Petitioner at 29.

decisions on the death penalty to hold that

> capital punishment is not unconstitutional per se, and that a state, if it chooses, can punish murderers and seek to protect its citizenry by imposing the death penalty– so long as it does so through a statute with appropriate standards to guide discretion. If a state has such a properly drawn statute–and there can be no doubt that Florida has–which the state follows in determining which convicted defendants receive the death penalty and which receive life imprisonment, then the arbitrariness and capriciousness condemned in Furman [v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346] have been conclusively removed.

Id. at 605 (footnote omitted).[42] Petitioner's charge of discrimination on the basis of race, sex, and poverty was put to rest, Spinkellink, 578 F.2d at 616; see Smith v. Balkcom, 660 F.2d 573, 584-5 (5th Cir. 1981), modified, 671 F.2d 858 (5th Cir.1982), and the Spinkellink court similarly held that petitioner's inducement of guilty pleas argument is without merit. 578 F.2d at 606-09.

Petitioner lastly contends that the death penalty was "too great" in his case.

Essentially, petitioner asks this Court to review the many past Florida

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[42] See Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Roberts v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

capital sentence appeals to determine whether this sentence of death is consistent with those decisions. But is not "not necessary for [a] district court to undertaken such a case-by-case comparison." Id. at 604. The Court need only conclude that Florida's statutory capital sentence procedure is facially constitutional, Proffitt, and was followed in this case. But for the specific flaw noted in section VII, infra, this Court so concludes.

Habeas relief should be denied on grounds six through nine of this petition.

VI. THE "DEATH-PRONE" JUROR

In his tenth ground for relief, petitioner argues that the trial court violated the requirements of the sixth, eighth and fourteenth amendments by refusing to excuse for cause a venireman

who stated his view at voir dire that any person convicted of first degree murder should be sentenced to die. Trial Rec. at 315.[43] In denying the defense challenge, the trial judge stated that "it takes a majority of the verdict on the second stage of the trial for a recommendation," and that the venireman had not "said he is biased as far as the finding of any guilt or innocence is concerned." Id. at 315-16. The defense later excused the juror peremptorily. Id. at 401.

Respondent apparently understands petitioner to argue that Witherspoon v.

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[43] Respondent argues that this issue amounts to a "question of law which has been resolved adversely to petitioner and therefore requires no further hearing." Answer to Petition at 26. But applying federal constitutional law to the historical facts of the case is precisely the function of a federal court in ruling on a petition for habeas corpus. 28 U.S.C § 2254(a); Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764, 767, 66 L.Ed.2d 722 (1981).

Illinois, 391 U.S. 501, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), was violated by the trial court's failure to excuse the juror. But the specific dictate of Witherspoon was clearly not violated here; no venireman was excused for cause on the basis of a generalized objection to the death penalty. Witherspoon did follow what has long been the law, however, in stating that an accused has a right to an impartial jury and that a capital sentence imposed by a "hanging jury" violates fundamental constitutional principles. 391 U.S. at 523, 88 S.Ct. at 1778. This is all the more true in light of recent capital punishment decisions of the Supreme Court, which require that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably

directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg, 428 U.S. at 189, 96 S.Ct. at 2932. Florida's statute provides such suitable direction, Proffitt, 428 U.S. at 259-60, 96 S.Ct. at 2970, but the views of the juror in question here replace that discretion by a mandatory death sentence.

A venireman who believes that the death penalty should automatically and in every case flow from conviction of first degree murder must be excused. See Stroud v. United States, 251 U.S. 15, 40 S.Ct. 50, 64 L.Ed. 103 (1919); Crawford v. Bounds, 395 F.2d 297 (4th Cir.1968), cert. denied, 397 U.S. 936, 90 S.Ct. 941, 25 L.Ed.2d 117 (1970). In this case, the trial court's error in refusing to excuse such a venireman for cause forced petitioner to expend one of his allotted peremptory challenges to excuse the

individual from serving on the jury. But the record reflects and petitioner concedes that he did not exhaust his peremptory challenges. Petitioner's Memorandum, November 1, 1982. See Fla. R.Crim.P. 3.350 (ten peremptory challenges allowed in capital case). Petitioner was therefore in no way prejudiced by the trial court's error in not excusing the jury for cause. See Stroud.

Relief must therefore be denied on this ground.

VII. UNFETTERED SENTENCING DISCRETION AND NONSTATUTORY AGGRAVATING FACTORS

Petitioner's eleventh ground for relief raises several attacks on his sentence and the findings upon which it was based. His first attack is easily met. Petitioner contends that his sentence was unconstitutional because "[n]one of

aggravating circumstances found to support the death sentence was alleged in the indictment. " Petition at 31. Mr. Meyers moved to dismiss the indictment on March 28, 1974, Trial Rec. at 78, but this untimely motion apparently did not raise the claim now asserted. The claim is therefore arguably waived. Wainwright v. Sykes. But see Respondent's Answer ¶II; Hopkins v. Jarvis, 648 F.2d 981 (5th Cir. Unit B 1981). Even assuming this argument is properly presented, petitioner has cited no decision holding that such an enumeration of aggravating circumstances is required. See Spinkellink, 578 F.2d at 609. In light of this absence of authority and considering the limited number of aggravating circumstances available to the prosecution in Florida, Fla.Stat § 921.141(5) (1973), the Court finds petitioner's argument to be without

merit.

Petitioner's third attack also fails. He contends that "[n]one of the aggravating circumstances used to support the death sentence was found to exist beyond a reasonable doubt ...." Petition at 32. The jury was properly instructed. Trial Rec. at 1230.

Petitioner's major argument is that his sentence was unconstitutional because the sentencer was allowed to consider, and actually relied in part upon nonstatutory aggravating circumstances. It cannot be disputed that evidence concerning Alvord's potential for dangerousness in the future was allowed in at the sentencing hearing through the testimony of Dr. Robey. See section I(B), supra. The sentencing judge properly instructed the jury that it could consider only those aggravating factors listed in the statute. Trial Rec. at

1227. The findings entered by the judge, however, included this statement: "The Court finds that based on all the facts and circumstances presented the defendant, [Alvord], has been and would continue to be a danger and a menace to society and therefore must pay the ultimate penalty, death by electrocution, as provided by the laws of the State of Florida." Trial Rec. at 99. The quoted sentence does not appear among the four findings listed by the judge as aggravating circumstances, nor does it appear among the eight findings listed in mitigation; instead, it comprises the concluding sentence of the order.

The Courts of Appeals for the Fifth and Eleventh Circuits have held squarely that a death sentence is unconstitutional if based on evidence of findings of aggravating circumstances not included

among those listed in the Florida statute. Proffitt, 685 F.2d at 1266 69; Henry v. Wainwright, 661 F.2d 56 (5th Cir.), vacated on other grounds, 457 U.S. 1114, 102 S.Ct. 2922, 73 L.Ed.2d 1326 (1982) (adopted in Proffitt). A defendant's potential for dangerousness in the future is not a statutory aggravating factor in Florida."[44] See Fla.Stat § 921.141(5). Cf. Smith, 101 S.Ct. at 1870 (considering Texas statute, which includes future

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[44] The only statutory aggravating circumstance that might conceivable apply is that "[t]he defendant knowingly created a great risk of death to many persons." That factor, which was found to exist in this case, relates to the character of the offense, not of the accused.

Respondent insists that the finding of future dangerousness did not relate to a nonstatutory aggravating factor, but rather negated a mitigating circumstance. It does not state what statutory mitigating factor the finding might possibly negate, nor does it cite authority in support of this bootstrapping argument.

dangerousness as aggravating circumstances). Indeed, the Proffitt court held the death sentence in that case unconstitutional precisely because the sentencing judge had included among his findings the statement that Proffitt was a "danger and a menace to society":

> In considering [Proffitt's] 'propensity to commit [murder]' and the danger he posed to society, the trial court transcended the list of aggravating factors set forth in the Florida statute and substituted his own judgment of what circum stances justify capital punishment for that of the Florida legislature. In so doing, the trial judge not only committed error under the state law; he also exceeded the federal constitutional limitations imposed by Furman on capital sentencing by increasing the risk that the death penalty would be imposed in an arbitrary and capricious manner.

685 F.2d at 1267 (citation omitted).

This case is indistinguishable from Proffitt in this regard. In both cases, the state introduced evidence at the sentencing phase relating to the defendant's potential for dangerousness in

the future, see 685 F.2d at 1267 n. 61, and in both cases the jury was correctly instructed to consider only statutory aggravating circumstances. Id. at 1267. The only possible difference is that the sentencing judge in Proffitt presumably included future dangerousness among his express findings of aggravating factors, while Alvord's sentencer stated his reliance on that nonstatutory factor in the closing sentence of his order. This Court cannot conclude from the textual placement of the trial judge's finding of future dangerousness that the nonstatutory finding was not considered in imposing the death sentence, for to so conclude would hazard an unnecessary risk that the death sentence in this case was imposed on the basis of considerations made impermissible

by the Florida Legislature.[45] Alvord's sentence cannot stand.

VIII. LOCKETT: RESTRICTION OF MITIGATING CIRCUMSTANCES

Petitioner's final claim, number twelve, is that the sentencing jury was

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[45] In Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), the Supreme Court was invited to ignore a sentencing judge's offhand remark to the effect that he was not permitted by statute to consider nonstatutory mitigating factors. In line with its holding in Lockett, the Court remanded to allow the state courts to "consider all relevant mitigating evidence." 102 S.Ct. at 877. "Although one can reasonably argue that these extemporaneous remarks are of no legal significance, ... Lockett compels a remand so that we do not 'risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" Id. at 878 (O'Conner, J., concurring) (quoting Lockett, 438 U.S. at 605, 98 S.Ct. at 2965).

This case mirrors Eddings in that nonstatutory aggravating circumstances were considered in imposing the death penalty, but the risk in assuming proper consideration by the sentencing judge is precisely the same.

impermissibly precluded from considering mitigating circumstances other than those listed in section 921.141(5), Fla.Stat. Alvord does not contend that he was prevented from introducing evidence at the sentencing of nonstatutory mitigating factors. Rather, he contends that the advisory jury was prevented from considering nonstatutory mitigating circumstances by the terms of the sentencing court's instructions. Respondent is apparently satisfied to note that no restrictions were placed on petitioner's right to present evidence to the jury Answer to Petition at 28.

Petitioner's evidence of nonstatutory mitigating circumstances was notably sparse in this case. The major part of Dr. Robey's testimony concerned Alvord's history of mental illness and his mental state at the time of the offense in

question. This information is relevant to the two psychiatric mitigating circumstances listed in Florida's statute. See Fla.Stat. § 921.141(6)(b) and (f).[46] He did unquestionably state one extremely important opinion: that Alvord could be rehabilitated with proper treatment. Trial Rec. at 1191-92. He also testified that petitioner was married and a father. Neither the defendant's potential for rehabilitation nor his family circumstance is among the statutory mitigating factors.

In his instructions, the sentencing judge stated to the jury that "[t]he aggravating circumstances which you may consider are limited to such of the

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[46] Dr. Robey's conclusion that Alvord was sane under M'Naghten at the time of the Florida crimes is arguable evidence of a nonstatutory mitigating circumstance in light of the difference between the M'Naghten standard and the tests stated in subsections 921.141(6)(b) and (f), Fla. Stat.

following as may be established by the evidence." Id. at 1227. After listing the statutory aggravating circumstances, the judge continued:

> If you do not find that there existed any of the aggravating circumstances which has [sic] been described to you, it would be your duty to recommend a sentence to life imprisonment. Should you find one or more of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist.
>
> The mitigating circumstances which you may consider if established by the evidence are these:

and proceeded to list the statutory mitigating factors. Id. at 1228 29. A few moments later, the judge instructed the jury that

> "[i]f one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating

> circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence which should be imposed."

Id. at 1230.[47]

The death penalty cannot constitutionally be imposed on the basis of a statute or instructions that prevent the sentencer from considering nonstatutory mitigating circumstances. Lockett v. Ohio, 438 U.S. 586, 596, 98 S.Ct 2954, 2960, 57 L.Ed.2d 973 (1978) (plurality); Bell v. Ohio, 438 U.S. 637, 98 S.Ct 2977, 57 L.Ed.2d 1010 (1978) (plurality). The Fifth and Eleventh Circuits have interpreted Lockett several times. In Chenault v. Stynchcombe, 581

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[47] Mr. Meyers did not object to the sentencing instructions. Respondent has waived any possible exhaustion argument that might flow from that fact, however. See Answer to Petition ¶3. Cf. Ford, 696 F.2d at 812.

F.2d 444 (5th Cir.1978), the court read Lockett and Bell "to mandate that the judge clearly instruct the jury about mitigating circumstances and the option to recommend against death." Id. at 448.[48] Thus, Lockett is violated not only by the exclusion of evidence relating to nonstatutory mitigating factors, but by instructions that limit "the sentencer's consideration of that evidence except as if related to the statutory mitigating factors." Washington v. Watkins, 655 F.2d 1346, 1375 (5th Cir. Unit A 1981), cert. denied, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982).

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[48] The Chenault court did not consider the merits of Chenault's Lockett claim because he had not exhausted state remedies on the issue. 581 F.2d at 447. It did hold, however, that the Lockett argument presented by Chenault "implicate[d] a substantial denial of a federal constitutional right." Id. at 448.

The Fifth Circuit has at least twice faced glaring violations of Lockett. In Watkins, the sentencing jury was instructed to consider "only" certain enumerated aggravating factors; it was then told to "consider the following elements of mitigation," whereupon the judge listed only two of the several statutory mitigating circumstances. The Fifth Circuit read these instructions to limit the jury's consideration of nonstatutory mitigating factors, and concluded that the charge was not saved by the trial judge's statement to the jury that "[i]n reaching your decision you must obviously consider the detailed circumstances of the offense for which the defendant was convicted and the defendant himself." Id. at 1369. In Spivey v. Zant, 661 F.2d 464 (5th Cir. Unit B 1981), decided only one month after Watkins, the

court faced a similarly glaring Lockett violation: the trial judge's instructions contained express mention of aggravating factors only. Circumstances in mitigation were noted only implicitly when the court told the jury to "consider all the evidence" in reaching a sentencing decision. The Fifth Circuit held that a jury must "receive clear instructions which not only do not preclude consideration of mitigating factors, Lockett, but which also 'guid[e] and focu[s] the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender ....'" Id. at 471 (quoting Jurek, 428 U.S. at 274, 96 S.Ct. at 2957). It concluded that the instructions at issue were constitutionally inadequate for their failure to "describe the nature and function of mitigating circumstances," or

guide the jury "toward the consideration of mitigating circumstances by special interrogatories." Id. at 472.

More recently, however, the Eleventh Circuit has faced a Lockett argument attacking jury instructions essentially identical to those in this case. In Ford v. Strickland, 696 F.2d at 812 (11th Cir.1983) (en banc), the trial judge instructed the jury to consider "only" the statutory aggravating circumstances and to consider the following" mitigating circumstances. 696 F.2d at 812. He listed all statutory aggravating and mitigating circumstances.

Thus, the word "only" distinguished the instructions on aggravating factors from those on mitigating factors.

The Ford court upheld the instructions after noting that its task was to "determine the interpretation a

reasonable juror might give the words of the instruction in question." Id. (editing Sandstrom v. Montana, 442 U.S. 510, 514, 99 S.Ct. 2450, 2454, 61 L.Ed.2d 39 (1979)). This Court is led by Ford to the same result. First, the trial court's omission of the word "only" in listing the mitigating circumstances indicated to the jury that they might consider factors other than those listed by the judge in mitigation of sentence. See Ford, 696 F.2d at 812. Second, the instructions included a list of all statutory mitigating factors and did not limit the jury to considering only those listed. See Id. at 812-13; Cf. Washington v. Watkins, 655 F.2d at 1368. Third, petitioner was permitted to introduce evidence freely, without limitation to that relevant to a statutory mitigating factor. See Ford, 696 F.2d at 813. Fourth and finally, the

sentencing judge's order refers to "any circumstances which would mitigate the sentence in this case." See Id.

"Under these circumstances, a rational conclusion is that the jury did not perceive a restriction on the use of any mitigating evidence." Id. Relief on this ground is denied.

IX. CONCLUSION

Petitioner's several claims challenging the constitutionality of his conviction are without merit, and habeas relief on those grounds is hereby DENIED. For the reasons stated in section VII of this Opinion, however, petitioner's death sentence must be set aside. In the absence of either party's timely filed notice of appeal, the state of Florida is hereby DIRECTED to conduct a new sentencing hearing within a reasonable

time and in the manner provided by section 921.141, Fla.Stat. If no notice of appeal is filed and the State fails to hold another sentencing hearing within a reasonable time, the State is ORDERED to vacate petitioner's sentence and to impose a sentence less than death in accordance with state law. See Fla.Stat. § 775.082.

ORDER

On Motion to Alter or Amend Judgment

The Court has for consideration a motion to alter or amend judgment, filed by respondent pursuant to Rule 29, Fed.R.Civ.P. Rule 11, 28 U.S.C. foll. § 2254. The motion is procedurally proper, see Browder v. Director, Department of Corrections, 434 U.S. 257, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978), was timely filed, and has drawn response from petitioner.

Respondent seeks reconsideration of

that portion of this Court's March 23, 1983 Memorandum Opinion that set aside petitioner's death sentence and required a new sentencing hearing. Respondent's first argument is ironic in light of the vigor with which he resisted the assertedly improper evidentiary hearing held in this case, see In re Wainwright, 678 F.2d 951 (11th Cir.1982) (denying petition for writ of prohibition); he contends that this Court should "reserve ruling" on the instant motion pending decision in Barclay v. Florida, 411 So.2d 1310 (Fla.1981), cert. granted, ___ U.S.___, 103 S.Ct. 340, 74 L.Ed.2d 382 (1982), and Zant v. Stephens, 456 U.S. 410, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982) (certifying question to Georgia Supreme Court). Secondly, he argues that Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir.1982), does not require that Alvord's sentence be set

aside.

The Court will consider respondent's second argument first. In Proffitt, the Eleventh Circuit overturned a death sentence on precisely the ground involved in this case: by considering Proffitt's potential for dangerousness in the future, the sentencing judge had "exceeded the federal constitutional limitations imposed by Furman [v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)] on capital sentencing by increasing the risk that the death penalty would be imposed in an arbitrary and capricious manner." 685 F.2d at 1267. Having already determined that two other aggravating factors relied upon by the sentencing judge were unconstitutional under Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), the Proffitt court was faced with one valid aggravating factor

remaining and no clear finding of mitigating circumstances. 685 F.2d at 1268. Fully recognizing the Zant case, it refused to deem the trial court's consideration of nonstatutory aggravating circumstances harmless error even in the absence of mitigating circumstances against which the remaining aggravating factor might come up short: "Only where the factors supporting the death sentence are so clear that proper application of the statute by reasonable persons could produce no other result should a sentence be affirmed despite constitutional error." Id. at 1269 & n. 64. This case presents facts even less conducive to a finding of harmless error than were present in Proffitt, for there remain in this case several mitigating circumstances to be weighed against such valid aggravating

factors as remain for consideration.[1]

Several months after Proffitt, the en banc Eleventh Circuit decided Ford v. Strickland, 696 F.2d 804 (11th Cir.1983). In Ford, the Florida Supreme Court had invalidated three of the eight aggravating factors found to exist by the sentencing judge: two were supported by insufficient evidence, and one was based on the same aspect of the crime as another aggravating factor. Ford v. State, 374 So.2d 496, 501-03 (Fla.1979). The Eleventh Circuit faced the question whether the Florida Supreme Court erred in failing to require resentencing in these circumstances. In its brief per curiam opinion, the en banc court affirmed denial of relief on this ground, but remanded this aspect of the

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[1] The pendency of a petition for rehearing en banc in Proffitt does not persuade this Court to ignore the precedential weight of that decision.

petition to the district court for further proceedings in light of the eventual decision in Barclay. A majority of the judges recognized in their various separate opinions, however, that the court's decision to impose a harmless error rule and to remand in anticipation of Barclay depended on the fact that the error found to exist in the sentencing proceedings was of state law only; had the sentencer heard evidence it was constitutionally prohibited from hearing or relied upon nonstatutory aggravating circumstances that were foreclosed by Proffitt and Furman, the sentence would have been set aside. 696 F.2d at 814 (Roney, J., with whom four judges joined); 696 F.2d at 824 (Godbold, J., with whom Judge Clark joined). See Henry v. Wainwright, 661 F.2d 56, 59 - 60 (5th Cir.1981), vacated and remanded on other

grounds, 457 U.S. 1114, 102 S.Ct. 2922, 73 L.Ed.2d 1326, judgment reinstated, 686 F.2d 311 (5th Cir.1982).

A post-Furman capital sentencing statute structured as Florida's requires the sentencing body to weigh those statutory aggravating factors it finds to exist against whatever circumstances it finds in mitigation. This decisional mechanism has been upheld under the Eighth Amendment as a rational means of assuring "that the death penalty will not be imposed in an arbitrary or capricious manner." Proffitt v. Florida, 428 U.S. 242, 252-53, 96 S.Ct. 2960, 2967, 49 L.Ed.2d 913 (1976). The difference between the errors in Ford on the one hand and in Proffitt v. Wainwright, Henry, and this case on the other is that between state-law errors within the constitutionally mandated structure and

errors of constitutional dimension that infect that structure. The Supreme Court's opinion certifying a question in Zant suggests that a state appellate court may in some circumstances impose a harmless error rule without doing violence to its constitutional role in the capital sentencing structure. But that is not to say that a federal court may overlook infectious error of a constitutional magnitude, for such error draws into question the structure itself.

Finally, the Eleventh Circuit very recently decided Goode v. Wainwright, 704 F.2d 593 (11th Cir.1983). Goode involved precisely the issue now before this Court, and the Goode court distinguished Ford and declined to await decision in Barclay and Zant for just the reasons stated in this Order. Id., at 612.

Accordingly, respondent's motion to alter judgment should be, and it is hereby DENIED.

IT IS SO ORDERED at Tampa, Florida this 5 day of May, 1983.

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. 97-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

GARY ELDON ALVORD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

VOLUME 2

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Gary Eldon ALVORD, a/k/a Paul Robert Brock, a/k/a Gary Eldon Venczel, Petitioner-Appellee, Cross-Appellant,

v.

Louie L. WAINWRIGHT, Secretary, Department of Corrections, Respondent Appellant, Cross-Appellee

No. 83-3395.

United States Court of Appeals, Eleventh Circuit.

Feb. 10, 1984.

Rehearing and Rehearing En Banc Denied April 25, 1984.

Appeals from the United States District Court for the Middle District of Florida.

Before HILL and FAY, Circuit Judges, and ALLGOOD*, District Judge.

JAMES C. HILL, Circuit Judge:

Louie L. Wainwright, Secretary of the Florida Department of Corrections, appeals to this court from the order of the

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* Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

district court holding invalid Gary Eldon Alvord's sentence of death and granting Alvord the writ of habeas corpus subject to the state's holding a new sentencing hearing. Alvord cross-appeals from the district court's denial of the writ on the other grounds raised in his petition. The Supreme Court's recent decision in Wainwright v. Goode, ___ U.S. ___, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983), mandates reversal of the portion of the district court's order granting the writ; we affirm the district court on all other grounds.

In 1974, Alvord was indicted, tried, convicted, and sentenced to death in Hillsborough County, Florida on three counts of murder in the first degree The Florida Supreme Court affirmed Alvord's convictions and sentence, see Alvord v. State, 322 So.2d 533 (Fla.1975), and the United States Supreme Court denied

certiorari, see Alvord v. Florida, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976). Alvord then filed a motion for reduction of sentence under Florida Rule of Criminal Procedure 3.800(b); the state court denied the motion, and the Florida Supreme Court refused a petition for a writ of mandamus in 1977. In 1978, Alvord filed a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850; the state court denied the motion, and the Florida-Supreme Court affirmed. See Alvord v. State, 396 So.2d 184 (Fla.1981). Alvord filed this case in federal district court in 1981. The district court, 564 F.Supp. 459, granted the abovedescribed partial relief, and both parties appealed.

I. RELIANCE ON NONSTATUTORY AGGRAVATING CIRCUMSTANCE

At Alvord's trial, the sentencing judge, after finding four statutory aggravating factors to be present, concluded his order imposing the death penalty by stating that Alvord "has been and [will] continue to be a danger and a menace to society and there fore must pay the ultimate penalty, death by electrocution, as provided by the laws of the State of Florida" The district court concluded that this statement demonstrates that the sentencing judge relied on a nonstatutory aggravating circumstance, see Miller v. State, 373 So.2d 882 (Fla.1979) (future dangerousness not a statutory aggravating factor); and, as dictated by our opinion in Goode v. Wainwright, 704 .F.2d 593, 612 (11th Cir.1983), held Alvord's death sentence constitutionally

invalid. The Supreme Court recently reversed Goode, see Wainwright v. Goode, ___ U.S. ___, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983), and the state contends that the Supreme Court's decision requires us to reverse the district court. Alvord argues that constitutionally based distinctions require a different result in this case than the result reached by the Supreme Court in both Wainwright v. Goode and Barclay v. Florida, U.S., 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983).[1]

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[1] The state argues on appeal only that Barclay and Goode allow the sentencing judge to rely on the nonstatutory factor in this case and does not contend that the failure of the trial judge affirmatively to find future dangerousness as an aggravating factor when listing the four (other) aggravating factors indicates that the trial judge did not rely on future dangerousness as a factor. We will assume for purposes of this opinion that the state judge relied on future dangerousness as a separate and distinct factor.

This case is the latest of several cases, including Goode, in which this court has addressed this issue. See, e.g., Proffitt v. Wainwright, 685 F.2d 1227, 1266-69 (11th Cir.1982), cert. denied, U.S. ___, 104 S.Ct. 508, 78 L.Ed.2d 697 (1983); Stephens v. Zant, 631 F.2d 397 (5th Cir.1980), modified, 648 F.2d 446 (5th Cir.1980), rev'd and remanded, ___U.S. ___, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), on remand, 716 F.2d 276 (5th Cir.1983); Henry v. Wainwright, 661 F.2d 56 (5th Cir. Unit B 1981) (Henry I), vacated and remanded, 457 U.S. 1114, 102 S.Ct. 2922, 73 L.Ed.2d 1326 (1982), judgment reinstated, 686 F.2d 311 (5th Cir. Unit B 1982) (Henry II), vacated and remanded, ___ U.S. ___, 103 S.Ct. 3566, 77 L.Ed.2d 1407 (1983), prior judgment reversed, 721 F.2d 990 (5th Cir. Unit B 1983) (Henry III). A review of these cases

and of the Supreme Court's decision in Barclay v. Florida, ___ U.S. ___, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), leads us to the conclusion that any reliance by the trial judge on Alvord's propensity to commit violent crimes in the future does not constitute constitutional error.

Alvord's first argument (raised in his brief before the Supreme Court decided Goode) is that Proffitt requires this court to invalidate his sentence.[2] Proffitt, 685 F.2d at 1260-69, would seem to mandate such a result. The Supreme

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[2] We realize that the Supreme Court denied certiorari in Proffitt, see ___ U.S. ___, 104 S.Ct. 508, 78 L.Ed.2d 697; however, the denial of certiorari has no precedential effect. In Proffitt, we found other constitutional inadequacies in the sentencing hearing. See 685 F.2d at 1251-1265 (confrontation clause violation; Godfrey v. Georgia invalid statutory aggravating factor). The Court's decision in Goode obviously does not invalidate our holding in Proffitt as to the effect of the confrontation clause.

Court's decisions in Goode and Barclay, however, invalidate the reasoning relevant to our decision in this case set forth in that opinion.[3] In Goode, the Supreme Court gave three alternative reasons for its reversal of our decision. First, stated the Court, if reliance on a nonstatutory factor presents a question of law, we should not have displaced the Florida Supreme Court's resolution of an issue of state law. ___ U.S. at ___, 104 S.Ct. at 382. Second, if the reliance presents an issue of fact, we failed adequately to defer to a state finding of fact under 28 U.S.C. § 2254(d) (1976). Id. at 104 S.Ct. at 382. Third, even if the sentencing judge relied on a factor

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[3] Alvord dropped at oral argument (held after that Goode decision) the contention that Proffitt controls here and asserted that this case is distinguishable from Goode for the reasons discussed below.

"unavailable to him under state law," this reliance, given the review by the Florida Supreme Court, did not render Goode's sentencing unconstitutional. Id. The Court noted that there "is no claim that in conducting its independent reweighing of the aggravating and mitigating circumstances the Florida Supreme Court considered Goode's future dangerousness." Id.

We see no possible distinctions indicating that Proffitt, not Goode, would control this case. The existence of mitigating circumstances no longer is of importance. We relied on their existence in Goode and concluded that it was not a case, as was Barclay or Ford v. Strickland, 696 F 2d 804, 815, 820 (11th Cir.1983) (en banc), in which the Florida "harmless error" rule applied. In both Barclay and Ford, no mitigating

circumstances were found; however, in Goode, as in this case, substantial mitigating factors (here, inability to conform to the requirements of the law and extreme mental disturbance) were present. The Supreme Court invalidated that distinction.[4]

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[4] The Supreme Court indicated in Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), that although the presence of mitigating circumstances might be constitutionally significant, the issue was not before them in that case. The Court stated:

> Finally, we note that in deciding this case we do not express any opinion concerning the possible significance of a holding that a particular aggravating circumstance is "invalid" under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty.

Id. 103 S.Ct. at 2750. In Barclay, the Court noted that no mitigating factors were found by the judge although some

In the final analysis, the Supreme Court in Goode held that if the state supreme court approves a conviction and death sentence despite reliance on evidence of, or findings of, nonstatutory circumstances, a federal habeas court cannot grant relief unless the evidence or factor in question was constitutionally inappropriate. See also Zant v. Stephens, 103 S.Ct at 2748-49; Barclay, 103 S.Ct. at 3434 35 (Stevens, J., concurring). There is no basis for finding unconstitutional the nonstatutory factor at issue here; indeed, the factor—future dangerousness—is the same factor relied on in Goode. And we find no distinction between the review and approval of the death sentence by the

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existed. 103 S.Ct. at 3435-36 (Stevens, J., concurring). In Goode, the Court thus extended its holding in Barclay to cover cases in which the trial judge finds mitigating factors to exist.

Florida Court in this case and the review and approval in Goode. Compare Alvord v. State, 322 So.2d 533 (Fla. 1975) with Goode v. State, 365 So.2d 381 (Fla.1978). Although the Florida Court approved the death sentence in Alvord without mention of the trial judge's reliance on the nonstatutory factor, the same was true in Goode, and the Supreme Court approved that procedure.[5]

Henry III and our above analysis of the Goode decision invalidate the remaining distinctions raised by Alvord at oral argument. He contends that the evidence of dangerousness in this case was not properly admissible and that the failure of the Florida Court to follow its

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[5] As we noted in Henry III, 721 F.2d at 994-995, the failure of the Florida Supreme Court affirmatively to pass on an issue apparently does not lessen the deference required by Barclay and, now, by Goode.

statutes violates the due process clause. In Goode, the Court invalidates the latter argument: in both this case and in Goode the Florida Court followed exactly the same procedure. As to the former argument, both Goode and Henry III, 721 F.2d at 994, indicate that admissibility of evidence, absent constitutional infirmity, is a question of state law. The evidence here was relevant to Alvord's character, which is a proper subject of inquiry at a sentencing hearing. See, e.g., Barclay, 103 S.Ct. at 3434-35 (Stevens, J., concurring). Finding no distinctions of significance between this case and Goode, we reverse the order of the district court granting the writ because of the trial judge's reliance on the nonstatutory factor.

II. EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL

On cross-appeal, Alvord first argues that the district court erred in deciding that he received effective assistance of counsel at trial and that his counsel's assistance at his sentencing hearing, although ineffective, did not prejudice him. He contends that his trial counsel, Mr. Meyers, failed adequately to investigate the possibility of an insanity defense at trial and committed a clearly prejudicial mistake in failing to raise such a defense. He also contends that Meyers failed to unearth and present evidence at the sentencing hearing demonstrating his lack of ability to conform his conduct to the requirements of the law. We conclude that the district court properly resolved both issues

against Alvord.[6]

The record demonstrates that Alvord has a long history of mental illness. He first entered a mental hospital at age thirteen. In 1967, he was charged with the rape and murder of a ten year old girl in Michigan; after spending two years in an institution, he was declared competent to stand trial on the charge but was found not guilty by reason of insanity. Alvord committed the three murders for which he received the death sentence after escaping from the Ionia State Hospital in Michigan.

Meyers was appointed counsel for Alvord shortly after Alvord was indicted in 1973. Alvord refused to talk with Meyers; however, Meyers learned from the prosecutor that Alvord had been

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[6] The district court held an evidentiary hearing on this claim; Alvord does not challenge the adequacy of the hearing.

adjudicated not guilty by reason of insanity in Michigan. Meyers therefore moved for a mental examination of Alvord, and the trial judge directed two court-appointed psychiatrists, Drs. Sprehe and Gonzales, to conduct the examination. Alvord refused to talk with the psychiatrists without his attorney present, and the psychiatrists could give no opinion as to Alvord's mental state. The trial judge therefore committed Alvord to a state hospital for observation. The judge later rescinded this order, however, because he doubted his authority to issue it,[7] and the state instead invited Dr. Robey, a psychiatrist who had worked with Alvord in Michigan, to come and conduct an

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[7] Meyers did not learn until several weeks had passed that Alvord had not been committed; he then moved several times to have Alvord recommitted.

examination.[8]

Alvord talked with Dr. Robey, and Robey testified at a pretrial hearing held by the court that Alvord was competent to stand trial. See infra § IV (setting forth Robey's testimony). Robey again examined Alvord after the hearing and concluded that Alvord was both competent to stand trial and sane at the time he committed the offense. (Apparently the illness suffered by Alvord is a type that can suddenly recur or go into long

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[8] Alvord contends that the trial judge issued these orders on his own motion or at the suggestion of the prosecutor. From examining the record, however, we concluded that Meyers made numerous motions; for example, the state contended at a speedy trial hearing that delays in the trial were caused by Meyers' numerous motions to have Alvord examined or committed or both. Meyers and the trial judge clearly accepted these statements by the prosecutor as true. Thus, Alvord's present contention that Meyers virtually ignored him before the trial is contradicted by these portions of the record.

remissions.) The court ordered that Sprehe and Gonzales again attempt to examine Alvord; at another competency hearing, Sprehe testified that Alvord was competent to stand trial, but qualified his opinion because Alvord was still uncooperative. Gonzales, because of Alvord's lack of cooperation, could form no opinion. Relying on the testimony of Robey and Sprehe, the court ruled Alvord competent to stand trial.[9]

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[9] Alvord asserts that the trial court's reliance on Robey's testimony was improper. Although we will more fully address this contention in a later section of our opinion, see infra §IV, we pause now to note the unique role played by Dr. Robey in these proceedings. The trial judge made every effort to ensure that Alvord received a fair and adequate examination. Both Alvord's attorney and the prosecutor wanted a mental examination of Alvord to be conducted; however, Alvord repeatedly refused to talk to the court-appointed psychiatrist. Therefore, at state expense, the trial judge requested Dr. Robey to fly in from Michigan to examine Alvord. Robey had been primarily responsible for Alvord's treatment while

Nevertheless, a few weeks before trial, the court ordered Sprehe and Gonzales again to examine Alvord. Sprehe again testified, after the examination, that Alvord was competent; Gonzales again could not form an opinion. Neither doctor could testify as to Alvord's sanity at the time of the offense. Although Meyers

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he was a patient in Michigan; and, as Robey testified at trial, he knew Alvord better than any other doctor. See infra §IV (quoting from transcript).

Robey's knowledge of Alvord's history and illness placed him in a uniquely qualified position to perform the needed examination. Furthermore, he was a psychiatrist with whom Alvord was willing to talk and by whom Alvord would consent to be examined. The trial judge could well have concluded that if one of the numerous psychiatrists in Florida could not examine Alvord, calling in a psychiatrist from Michigan would be a waste of resources. He did not so conclude, and we commend the judge for responding to the problems presented by Alvord's refusal to talk to court-appointed doctors by adopting the logical solution of obtaining, at obvious expense, the doctor most qualified to render an opinion.

asserted that the Michigan conviction constituted prima facie evidence of incompetency, the trial judge, noting that Meyers had produced no documentary evidence of that judgment, again pronounced Alvord competent to stand trial. Before trial, Meyers moved unsuccessfully for Alvord to be committed for observation and filed a notice of intent to plead insanity, attaching a copy of Alvord's previous acquittal on the basis of insanity, which is now inexplicably absent from the state trial record.[10]

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[10] The district court found (as an historical fact) that Meyers filed this notice, and it has now been added to our record on appeal.

A. *Meyers' Assistance at the Guilt-Innocence Phase.*

Meyers conducted no independent investigation into Alvord's history of mental illness. He did not contact doctors, other than Robey, at the Michigan hospital at which Alvord spent a considerable amount of time, nor did he obtain any except a small portion of Alvord's medical record. He did not raise at trial the presumption of insanity afforded Alvord under Florida law by reason of his prior adjudication of insanity, the effect of which is to place the burden on the prosecution to prove sanity beyond a reasonable doubt. See Parkin v. State, 238 So.2d 817 (Fla.1970); Livingstoll v. State, 383 So.2d 947 (Fla. App.1980); Hixon v. State, 165 So.2d 436 (Fla. App.1964). Alvord contends that these actions and inactions constitute

ineffective assistance.

In response to Alvord's contentions, the state argues that Meyers properly failed to investigate the possibility of raising the insanity defense because Alvord refused to allow that defense and properly failed to raise the defense because Alvord insisted on relying on an admittedly weak, unsupported alibi."[11] Meyers testified at the evidentiary hearing that Alvord's lack of cooperation caused him to abandon the insanity defense; given Robey's opinion that Alvord was sane at the time of the offense, Meyers did not think it would be successful without Alvord's cooperation.

The question we must decide is whether, under the circumstances, Meyers' decisions and actions constituted

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[11] The evidence produced a trial of Alvord's guilt was overwhelming.

reasonably effective assistance. See Washington v. Strickland, 693 F.2d 1243 (5th Cir. Unit B 1982) (en banc), cert. granted, U.S. —, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983). It is now axiomatic that the petitioner must prove his counsel ineffective by a preponderance of the evidence. Id. at 1250. It is also axiomatic that counsel has a duty to conduct a reasonable investigation under the circumstances. Id. at 1251-58. The issue presented in this case, however, is slightly different than the issue in Washington v. Strickland and in many other cases: here, the defendant, Alvord, did not want and affirmatively sought to prevent his trial attorney from asserting the insanity defense that he now claims his attorney, as a matter of constitutional law, should have raised. Thus, this is not the same case as several

cited by Alvord in which the defendant was willing to assert the defense but his attorney's inadequacy prevented him from doing so successfully. See Beavers v. Balkcom, 636 F.2d 114 (5th Cir. Unit B 1981); Davis v. Alabama, 596 F.2d 1214 (5th Cir.1979), vacated as moot, 446 U.S. 903, 100 S.Ct. 1827, 64 L.Ed.2d 256 (1980); United States v. Fessel, 531 F.2d 1275 (5th Cir.1976).

We conclude that in this case the assistance rendered by Meyers met the requirements of the Constitution. See, e.g., Washington v. Watkins, 655 F.2d 1346, 1356 (5th Cir.1981) ("effectiveness may not be assessed through the finely ground lenses of 20/20 hindsight"). Here, the state provided three psychiatrists to interview Alvord, and he would only communicate with Robey. Robey, who indicated that he was more familiar with

Alvord than any other psychiatrist, testified that Alvord was both sane and competent to stand trial. See infra § IV (setting forth testimony from transcript). After repeated and conscientious attempts to have doctors communicate better with Alvord, the trial judge ruled Alvord competent. Meyers repeatedly advised Alvord to assert the insanity defense, but Alvord refused to do so. Meyers therefore did not assert the defense but argued that Alvord's incapacity weighed against imposition of the death penalty.

In light of Alvord's refusal to assert the insanity defense, although earnestly counseled by his defense attorney to do so, we conclude that Meyers rendered competent assistance. Further research into Alvord's background would have been fruitless because Alvord would not allow Meyers to produce evidence of

insanity. The trial judge held Alvord competent—on the unrebutted advice of two psychiatrists—and the only psychiatrist able to form an opinion would have testified that Alvord was sane. In addition, given Alvord's competency, Meyers was ethically bound to follow his client's wishes. See Foster v. Strickland, 707 F.2d 1339, 1343 (11th Cir.1983). In Foster, the attorney wanted to present a second-degree murder defense based on a depraved-mind theory; the defendant refused to allow that defense, and this court held that the decision of the attorney to follow his client's wishes did not constitute ineffective assistance. Id.

We realize that there may be cases in which the client's faculties are so impaired that the client cannot choose for himself what to do. Alvord argues that this is the problem here and cites Brennan

v. Blankenship, 472 F.Supp. 149, 156 (W.D.Va.1979), aff'd mem., 624 F.2d 1093 (4th Cir.1980); however, we need not comment on the resolution of that case by our sister circuit nor do we need to speculate here on what facts might lead us to conclude that the attorney should ignore his client and pursue some other unspecified course of action. Hopefully, if the client cannot adequately help prepare his defense, the trial judge will rule him incompetent to stand trial. Here both psychiatrists testified to Alvord's competency, and Meyers made a reasonable effort to convince the judge to rule Alvord incompetent.[12] Given this

[12] We have read the record of all the pretrial proceedings in this case. We are convinced that Meyers rendered effective assistance; he argued for Alvord's commitment; he moved for a declaration of incompetency; he cross-examined the expert witnesses. Meyers cannot be faulted simply because he did not succeed.

determination, Meyers adopted a reasonable course of action under the circumstances.

B. *Effective Assistance at the Sentencing Hearing.*

Alvord contends that Meyers failed to provide effective assistance at his sentencing hearing because he failed to collect and present as mitigating evidence Alvord's extensive history of mental illness; failed effectively to cross-examine Robey, who testified for the state, because of Meyers' unfamiliarity with Alvord's background; failed to produce other psychiatrists as "rebuttal witnesses"; and failed to produce witnesses to testify favorably regarding Alvord's character. The record demonstrates that Meyers called no witnesses at the sentencing hearing; however, Meyers testified before the district court that, had the state not

called Robey, he would have called him because Robey would testify to the existence of the two mitigating circumstances found by the jury and judge. The district court stated that it was "prepared to conclude that" Meyers rendered ineffective assistance because of his failure adequately to investigate Alvord's background; however, the court denied the writ on this issue because it found that Alvord suffered no prejudice. We also conclude that Alvord suffered no prejudice; we therefore need not decide whether Meyers' assistance was ineffective.[13] See Washington, 693 F.2d

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[13] Alvord raises one other claim: he contends that Meyers' closing argument was constitutionally ineffective under King v. Strickland, 714 F.2d 1481 (11th Cir. 1983). Meyers' closing argument in this case does not remotely resemble the argument in King. In King, the counsel "separated himself from his client" and "may have done more harm than good." Id. at 1491. Meyers, however, made a lengthy

at 1264 n. 33 (no need to address ineffectiveness if no prejudice).

At the sentencing hearing, Robey testified to the existence of the two mitigating circumstances found in this case He stated that Alvord had been previously adjudicated insane and asserted strongly that Alvord's mental illness was not of the type that Alvord could not be rehabilitated. The state called Robey, so Alvord cannot blame Meyers for any testimony by Robey that he now considers damaging.[14] As the district judge noted,

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argument describing the horrible circumstances of an execution and Alvord's inability to conform his conduct to society's dictates; he also noted that the judge could put Alvord in jail for life, thus rebutting any argument that Alvord could kill again. Given the overwhelming proof of Alvord's guilt, Meyers clearly rendered constitutionally effective assistance.

[14] Alvord contends that parts of Robey's testimony were not admissible. Alvord's contention, which we have

Alvord offered at neither the state nor the federal habeas evidentiary hearings evidence that Meyers could have produced had he conducted an investigation and called other witnesses; he also did not explain how Meyers could more effectively have cross-examined Robey. Alvord has called our attention to no evidence that Meyers should have produced at the sentencing hearing but did not; Alvord has not, therefore, carried his burden of establishing prejudice.[15]

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rejected above, is without merit. See supra §I (Goode decision requires deference to state evidentiary law; no constitutionally inadmissible evidence in this case).

[15] Alvord asserts in his brief that Meyers should have called witnesses in order to "humanize" Alvord in the eyes of the jury. The district court did not pass on the issue of whether Meyers' assistance was effective; however, the court indicated that it was prepared to find the assistance ineffective. We also do not pass on this issue; however, we note that the failure to attempt to "humanize"

Alvord contends that he deserves a new sentencing hearing despite our conclusion that he has not been prejudiced because in this case the "ineffectiveness of counsel is so pervasive that a particularized inquiry into prejudice would be 'ungrounded speculation.'" Washington, 693 F.2d at 1259 n. 26 (quoting United States v. Porterffield, 624 F.2d 122, 125 (10th Cir. 1980)). We are mindful that actual prejudice need not

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Alvord may well have been the most reasonable choice under the circumstances. It is not good trial tactics to attempt to persuade a jury of the verity of a proposition when it is manifestly impossible to do so. Alvord had committed three violent murders and had an extensive history of past criminal activity. He was not, to say the least, the boy next door who had never before show a propensity to commit crime. Meyers reasonably chose to rely primarily on the statutory mitigating circumstance that Alvord could not conform his conduct to the requirements of the law and argue to the jury that incarcerating Alvord would be sufficient specially to deter him from committing future crimes.

be demonstrated in some cases. See Holloway v. Arkansas, 435 U.S. 475, 98 S Ct. 1173, 55 L.Ed 2d 426 (1978) (state improperly requires single attorney to represent multiple defendants at same trial); Adams v. Balkcom, 688 F.2d 734, 739 n 1 (11th Cir.1982) (representation "functionally equivalent i n every respect to having no representation at all"). We recognized in Washington v. Strickland that prejudice need not always be demonstrated, 693 F.2d at 1259; however, Washington clearly implies that prejudice must be shown in this case. In both this case and Washington, the alleged inadequacy stems from a failure adequately to investigate, and we required the petitioners to show prejudice in Washington. We sit as a habeas corpus tribunal to grant relief to persons harmed because their constitutional rights have

been violated. In some cases, we will infer harm because, although it is difficult or impossible to prove, the circumstances of the petitioner's conviction are inherently prejudicial. In some cases, the harm is so obvious it would be a waste of resources to prove it. This case presents neither situation; the district court correctly held that Alvord must prove prejudice to obtain the writ.

III. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Alvord next contends that his appellate counsel rendered ineffective assistance. He sets forth five issues that his appellate counsel did not raise issues that, according to Alvord, would have persuaded the Florida Supreme Court to overturn his conviction. Although we address claims of ineffective assistance

of counsel on appeal much less frequently than claims of ineffective assistance at trial, it is well established that a defendant has the right to effective counsel on appeal. See Anders v. California, 386 U.S. 738, 741-42, 744, 87 S.Ct. 1396, 1398-99, 1400, 18 L.Ed.2d 493 (1966) (counsel must function as advocate on behalf of client). In order to prevail, Alvord must prove that he did not receive "'reasonably effective representation,'" Mylar v. Alabama, 671 F.2d 1299, 1300 (11th Cir. 1982) (citing previous cases), cert. denied, U.S., 103 S.Ct. 3570, 77 L.Ed.2d 1411 (1983); however, counsel need not provide perfect assistance, id. From the reported cases, it appears that counsel's failure to file a brief is in most cases ineffective, see Arders; Mylar; however, counsel's failure to advance errors on appeal later gaining "judicial

recognition" does not constitute unconstitutional aid, Sullivan v. Wainwright, 695 F.2d 1306, 1309 (11th Cir.), cert. denied, ___ U.S. ___, 104 S.Ct. 290, 78 L.Ed.2d 266 (1983), and counsel need not brief issues reasonably considered to be without merit, Mendiola v. Estelle, 635 F.2d 487, 491 (5th Cir. Unit A 1981); Hooks v. Roberts, 480 F.2d 1196, 1197-98 (5th Cir. 1973), cert. denied, 414 U.S. 1163, 94 S.Ct. 926, 39 L.Ed.2d 116 (1974). Alvord contends that the issues not raised by his counsel were of substantial merit. As we stated in Hooks, the best way to evaluate "this question . . . is to examine the alleged trial errors to see if they contain sufficient merit . . . that his appellate counsel can be faulted for not having raised them." 480 F.2d at 1197.

A. *Failure of Trial Judge Sua Sponte to Give Insanity Instruction.*

Alvord argues that his appellate counsel should have asserted as error the failure of the trial judge sua sponte to charge the jury that, because of his prior judgment of not guilty by reason of insanity, he was presumed insane until proven sane. We find ourselves in a rather unusual posture in this case. On the one hand, the issue of ineffective assistance—even when based on the failure of counsel to raise a state law claim—is one of constitutional dimension, see Hooks, 480 F.2d at 1197, and, as a mixed question of fact and law, the presumption of correctness under 28 U.S.C. § 2254(d) does not apply to this type of claim, see, e.g., Cuyler v. Sullivan, 446 U.S. 335, 341-42, 100 S.Ct. 1708, 1714-15, 64 L.Ed.2d 333 (1980). On the other hand, the

validity of the claim that Alvord's appellate counsel failed to assert is clearly a question of state law, and we must defer to the state's construction of its own law. Wainwright v. Goode, ___ U.S. ___, 104 S.Ct. 378, 382, 78 L.Ed.2d 187 (1983). In this instance, Alvord raised the present claim before the Florida courts on collateral attack of his conviction; and, in Alvord v. State, 396 So.2d 184, 191 (Fla.1981), the Florida Supreme Court expressly rejected it as without merit.

Although a bewildering mixture of issues both subject to and not subject to a presumption of correctness face us in this case, we believe the proper method of analysis is to accord deference to the Florida Supreme Court's decision to the extent it decides the validity of Alvord's underlying state law claims while

reserving for de novo consideration the ultimate issue of whether Alvord received constitutionally effective assistance. Following this analysis, it is clear from Alvord v. State that the Florida Court held that, as a matter of state law, the trial judge need not have instructed the jury sua sponte on the presumption of insanity. Quoting the trial court, the Florida Supreme Court stated:

> This ground for post conviction relief is also without merit. No proof of the Defendant's prior adjudication of insanity had ever been submitted to the Court and no such defense was raised. A Defendant has the burden of establishing a plea of insanity by showing that he was legally insane when he committed the criminal act. Hixon v. State, (D.C.A.1964) 165 So.2d, 436. The trial court is only required to instruct the jury on issues properly raised. Since the Defense did not choose to assert the defense of insanity, it would have been improper for the trial Court to have instructed the jury on that issue.

396 So.2d at 190 91. It thus seems clear that the trial judge, as a matter of state law, need not have given an instruction that was never requested.[16] Indeed, this conclusion is the only reasonable one under the circumstances—with or without the Florida Supreme Court's decision to aid us. Given the invalidity of the claim that Alvord contends should have been asserted, we conclude that, under Hooks and Mendiola, Alvord has failed to demonstrate with respect to this issue that his counsel rendered ineffective assistance.

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[16] We realize that the state court's assumption that Meyers never submitted the prior adjudication of insanity at trial has now been demonstrated to be erroneous. See supra note 10 and accompanying text. This does not alter our conclusion that the ground not asserted on appeal lacked merit. Meyers did not plead insanity at trial; and it seems clear from the state court's opinion that the judge need not instruct on an issue not raised.

B. *Failure of Trial Court to Grant Alvord's Pro Se Motion to Remove Public Defender as Counsel.*

At trial, Alvord requested the Judge to remove his appointed counsel, Mr. Meyers, because he did not trust Meyers to represent him. The trial judge indicated that he would consider the motion and instructed Meyers to file a formal, written motion should Alvord so desire. The trial judge did not remove Meyers from the case, however; and Alvord now contends that his appellate counsel should have asserted that the trial judge erred by not appointing a different counsel. Noting that the state collateral review court found as a matter of historical fact that Alvord "ultimately consented to being represented by ... Meyers," the district court held that finding to be fairly supported by the record, see 28 U.S.C. § 2254(d), and concluded that reasonable

counsel could have decided not to raise the issue on appeal, citing United States v. Young, 482 F.2d 993 (5th Cir.1973).

Alvord first argues that the district court erroneously treated the state court's finding on the consent issue as a question of historical fact instead of a mixed question of law and fact, which is afforded no presumption of correctness under section 2254. Alvord cites only Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), as support for this contention. We do not find Cuyler controlling here. In Cuyler the Court held that whether an attorney represented more than one defendant at trial is a mixed question and not entitled to a presumption of correctness. Id. at 341-42,100 S.Ct. at 1714-15. Whether Alvord decided to accept Meyers as his counsel is clearly a question of

historical fact. See Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed 2d 770 (1963). Unlike the issue in Cuyler, the inquiry here does not go directly to the effectiveness of the defendant's counsel or the prejudice caused by the representation afforded by the state. Thus, the district court properly afforded deference to the state court's finding on this issue.[17]

We must, of course, decide without employing a presumption of correctness whether Alvord's appellate counsel was ineffective in failing to raise the present issue. The finding that Alvord accepted his trial counsel certainly supports his appellate counsel's decision not to raise the point. In addition, the record demonstrates that the trial judge

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[17] Alvord does not content that he did not receive a full and fair hearing.

had every reason to believe that Meyers and Alvord had resolved their differences from Meyers' statements to that effect at the trial. See Brown v. Wainwright, 665 F.2d 607, 612 (5th Cir.1982) (en banc) (trial judge may accept counsel's statements and need not interrogate defendant independently). Given these underlying facts, we conclude that Alvord's counsel acted reasonably by not raising this claim on appeal.

C. *Examination of Alvord by Dr. Robey.*

As we have related above during our discussion of the events leading up to Alvord's trial, see supra § II, Dr. Robey examined Alvord, at the request of the trial judge, to determine his competency to stand trial. During the sentencing hearing, Dr. Robey testified for the state; although he based his testimony in

part on his previous knowledge of Alvord, he also relied on the pretrial interviews. Alvord contends that the trial judge should not have allowed Robey to testify at the sentencing hearing under the rule stated in Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). The issue before us is whether his counsel's failure to raise this issue on appeal constituted ineffective assistance.

The issue is not without difficulty. The predecessor to this court, in an opinion binding on us,[18] held that Estelle v. Smith applies retroactively. See Battie v. Estelle, 655 F.2d 692, 696-99 (5th Cir.1981). Nevertheless, the present fifth circuit apparently has held (in a non-binding opinion) that failure of counsel to anticipate Estelle v. Smith and

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[18] See Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc).

timely enter an objection does not constitute ineffective assistance of counsel. See Gray v. Lucas, 677 F.2d 1086, 1096 n. 9 (5th Cir.1982), cert. denied, ___ U.S. ___, 103 S.Ct. 3099, 77 L.Ed.2d 1357 (1983). This holding is in accord with the rule stated in Sullivan v. Wainwright, 695 F.2d 1306, 1309 (11th Cir.), cert. denied, ___ U.S.___, 104 S.Ct. 290, 78 L.Ed.2d 266 (1983), that counsel need not anticipate new developments in the law.

We need not rely only on the principle stated in Sullivan, however. As the district judge aptly noted:

> Several aspects of this case also indicate that Mr. Seymour cannot be faulted for not raising a Smith point on appeal. First, trial counsel failed to object to Dr. Robey's arguably Smith-violative testimony that petitioner would be dangerous to women in the future and that he was sane at the time of the Florida crimes. Trial Rec. at

1171-72, 1178-79. Second, and more fundamentally, the Smith issue would not necessarily have succeeded on appeal. In Smith the psychiatrist who examined the accused, Dr. Grigson, testified on the basis of that examination alone. Thus, there was no question that his conclusions on future dangerousness were based on statements made during a custodial examination without prior Miranda warnings or notice to counsel. Mr. Seymour faced quite a different circumstance: Dr. Robey had supervised Alvord's treatment for years prior to his escape in Michigan, and his contemporaneous examination of Alvord was in two sessions, the latter of which—on the specific question of petitioner's sanity at the time of the offense—was apparently in substantial compliance with the dictates in Smith. His testimony was therefore not based entirely, and may not have been based at all, on the first custodial examination. Finally, the record indicates unequivocally that Mr. Meyers was eager for Dr. Robey to examine his client. Meyers Depo. at 31.

564 F.Supp. at 481 482 (footnotes omitted). Given these factors, the rule in

Sullivan, and the fifth circuit's holding in Gray, we conclude that Alvord's appellate counsel rendered reasonably effective assistance even though he failed to raise this issue.

D. *Testimony by Robey in Violation of Fla.Stat.Ann. §§ 90.242 & 921.141.*

At the sentencing hearing, Robey testified that Alvord had previously committed two misdemeanors in Michigan and that he had committed kidnapping and rape for which he had been found not guilty by reason of insanity. Robey stated that he did not believe Alvord to have been insane when he committed the rape and kidnapping, however. Alvord argues that this testimony was not properly admissible under the Florida capital sentencing statute, Fla. Stat. § 921.141, because it does not tend to prove the presence or absence of the

specified aggravating and mitigating circumstances. He also contends that it was admitted in violation of the psychiatrist-patient privilege then codified by Fla.Stat § 90.242. He urges this court to conclude that his counsel's failure to raise these issues on appeal constituted ineffective assistance.

We begin our analysis by noting that Alvord's attorney raised a similar issue on appeal: he contended that Robey's testimony concerning the Michigan felonies was inadmissible under Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). The Florida Supreme Court rejected this claim. Alvord v. State, 322 So.2d 533, 539 (Fla.1975). Given the Florida Court's statement in that case that a wide open rule of admissibility applies at penalty hearings, id., we think it reasonable for Alvord's counsel not to

have asserted the grounds now set forth as limiting the admissibility of Robey's testimony. The testimony clearly bears on the presence or absence of prior criminal activity, Fla.Stat. § 921.141(6)(a), and the capacity of Alvord to conform his conduct to the requirements of the law, id., § 921.141(6)(f).

In addition, Alvord's counsel was reasonable in not asserting the psychiatrist-patient privilege. As the district court stated:

> The short answer is that the trial court took considerable care to ensure that Dr. Robey testified only to matters surrounding the Michigan crimes of which he had knowledge independent of communications from Alvord. Next, petitioner cites Parkin v. State, 238 So.2d 817, 818 (Fla. 1970) as grounding a possible argument on appeal. Parkin, decided over a decade before Smith, held that the fifth amendment rights of a criminal defendant who chooses to plead insanity were not violated when she was ordered by

> the trial court - to cooperate with court-appointed psychiatrists. The court limited the use of such testimony: [A]ny statements obtained from the patient by the doctor are used as evidence of mental condition only, and not as evidence of the factual truth which may be contained in them." Id. at 822. The answers to petitioner's contention that Mr. Seymour should have raised Parkin are twofold: first the record reflects again the care of the trial judge in limiting Dr. Robey's testimony on the Michigan crimes to facts he knew from sources other than Alvord's statements; and second, Dr. Robey certainly did not come to know of Alvord's criminal record in the course of the custodial examination he made in January 1974, and Parkin's limitations therefore would not apply. Thus, the decision not to raise these matters on appeal was a reasonable tactic.

This reasoning well supports the district court's conclusion that Alvord received effective assistance of counsel on

appeal.[19]

IV. ADEQUACY OF PSYCHIATRIC HEARING BEFORE TRIAL

Alvord contends that he did not receive due process of law at his trial because the competency hearings conducted by Dr. Robey, Dr. Gonzales, and Dr. Sprehe were insufficient to allow the trial judge accurately to rule on his competency to stand trial. Alvord relies on United States v. Taylor, 437 F.2d 371 (4th Cir.1970), and Blake v. Zant, 513 F.Supp. 772 (S.D.Ga 1981) (appeal docketed 5/13/81), and calls our attention to Judge

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[19] Alvord raises one other issue dealing with his counsel's alleged inadequacies. He contends that his counsel should have argued on appeal that he received an adequate psychiatric examination. As we conclude in the next section of this opinion, Alvord received a proper examination and hearing. See infra §IV. Thus, his counsel cannot be faulted for failing to raise this claim.

Sobeloff's opinion in Taylor discussing critically the competency examination in that case, see 437 F.2d at 379-83. It is now well established that conviction of a legally incompetent defendant violates due process. Pate v. Robinson, 383 U.S. 375, 386, 86 S.Ct. 836, 842, 15 L.Ed.2d 815 (1966); Reese v. Wainwright, 600 F.2d 1085, 1090-94 (5th Cir.), cert. denied, 444 U.S. 983, 100 S.Ct. 487, 62 L.Ed.2d 410 (1979). Stated in another way, the state must have held "an adequate hearing on [Alvord's] competency," Pate, 383 U.S. at 386, 86 S.Ct. at 842, or we must hold Alvord's conviction invalid. The district court properly refused to invalidate the conviction because an examination of the record shows that the state afforded Alvord an adequate hearing.

We need not repeat here the rather detailed account of the pretrial

proceedings related to Alvord's competency set forth above. See supra § II. To summarize the events, the trial judge several times ordered two psychiatrists to examine Alvord, but they were unable at first to form an opinion because of Alvord's failure to cooperate. The judge then ordered that Alvord be sent to the state mental hospital for observation, but he rescinded that order because he believed he lacked the necessary authority to enter it Tn order to obtain a meaningful examination and opinion, the court invited Dr. Robey to come to Florida from Michigan to examine Alvord at state expense. Robey talked twice with Alvord; and, primarily on the basis of Robey's diagnosis, the judge found Alvord competent

Alvord argues that the examination he received was grossly inadequate because of

the poor conditions and lack of time spent together by Robey and Alvord. Robey testified to this effect at the district court's evidentiary hearing. Supp. Appellate Rec. II, 21-24. We find no indication that Robey believed at the time he conducted his examination that he was operating under unacceptable conditions, however. The record shows that Robey submitted the following report to the trial judge:

> The above-named 26-11[?] year old white, married Catholic male was interviewed on two separate occasions at the Hillsborough County jail in Tampa, Florida. This evaluation was made at the request of the State Attorney following the defendant's refusal at an earlier date to in any way cooperate with the court appointed examining psychiatrists, Doctors Arturo G. Gonzales and Daniel J. Sprehe.
>
> The defendant in the present case is charged with three counts of first degree murder. He had previously been acquitted by Reason of Insanity in the

State of Michigan, and had been committed at the Ionia State Hospital, Michigan's equivalent of Chattahoochee State Hospital in Florida He had escaped from this institution on January 24, 1973, and had traveled to Florida. It was while on escape from Ionia State Hospital that he is alleged to have committed the three murders with which he presently stands charged.

The defendant was interviewed on two separate occasions. On the first of these interviews, on January 3, 1974, he was seen from 1:45 to 4:40 p.m. with one ten-minute break for the interviewer to answer a telephone call. Interview time on this date totaled two hours and forty five minutes. During this initial interview, evaluation was done of the defendant's competency to stand trial, but due to his refusal to discuss any of the details of the acts with which he was charged, no opinion could be rendered on criminal responsibility except one generally based on prior knowledge of the defendant in comparison with the mental state as seen during the interview. On the basis of this interview, an opinion was rendered in Court that the defendant was fully capable of recognizing the nature and object of the

proceedings, his own position in those proceedings as defendant, the nature and extent of the charges against him, and the possible penalties, and he was felt to be fully capable, insofar as he wished, to advise and cooperate with counsel in both the preparation and implementation of his defense. The defendant did make a statement both on interview, and subsequent thereto on January 4 before the Court, that he had less than complete faith in his assigned counsel and demonstrated this by comparison with the lawyer who had been assigned to him in Michigan on the question of his extradition to Florida. This very fact itself was indicative of competency to stand trial.

In regard to the question of criminal responsibility, as indicated above, the defendant initially would not discuss the situation. It was only after being reassured from the Bench by the Judge that any inculpatory statements he might make to the psychiatrist could not be used in the case in chief, that he then expressed willingness to discuss the matter.

On January 4,1974, the defendant was seen again from 6:45 to 9:00 p.m. on the issue

> of criminal responsibility. Based on this two and one-quarter hour interview, an opinion is rendered that in reference to the act charged, the defendant was aware of the wrongfulness of his actions. Despite this, paranoid and schizoid features are seen in the underlying basic immature sociopathic personality disorder, and were an A.L.I. Model Penal Code test used in the State of Florida, there could conceivably be some argument that, by reason of mental disease, he lacked substantial capacity to conform his behavior to the requirements of the law.
>
> In summary, an opinion is rendered that the defendant, Gary Alvord, is both competent to stand trial and criminally responsible under Florida law.

At one of the numerous pretrial hearings, Robey made the following statements concerning the adequacy and results of his examinations:

> Q. And throughout this interview with and examination of the defendant, Gary Alvord, were you able to form an opinion as to whether or not he would be able to aid and assist his

counsel in the preparation and presentation of his defense?

A. Yes, sir, I think, I have some qualifications in this area, but the qualifications are more concerned with the fact that he has been aware of comparisons or has made comparisons between the assistance he obtained from counsel here and the assistance he obtained, for instance, from counsel in Michigan at the time of his extradition. This showed me, of course, that while he might be concerned about the expertise that would be applied legally to his case, that any reluctance to cooperate would be just that. It would not be in any way based on mental illness. It would be based in the hope for the maximum representation he could receive.

Q. Are you saying that he was concerned that he was not going to get full legal protection here as opposed perhaps to the attorney he had in Michigan?

A. That is correct.

Q. Is that what you are saying?

A. Yes.

Q. So, it didn't have anything to do with any mental illness that he might not be able to—

A. No, sir.

Q. -aid and assist his counsel?

A. This, this was based in what I feel was entirely, logical, reasonable concern, particularly in view both of capital punishment being reinstituted in this state and the realization of the severity of the offense with which he is charged. And it indicated to me not that he was incompetent but that his abilities to thoroughly evaluate the legal situation were, as I indicated before, perhaps above average.

Q. Okay. So, as to his ability to aid and assist counsel, there is no, in your opinion, there is no mental illness or disease that would prevent or preclude him from aiding and assisting his counsel?

A. That is correct.

Q. Okay. Now, was he able to understand the charges pending against him in this case, three

counts of murder in the first degree?

A. Yes.

Q. And that is your opinion regarding that?

A. That's correct.

Q. Okay, No qualifications regarding it?

A. No, sir.

Q. As to his understanding of the charges?

A. All of these are within the bounds of reasonable medical certainty.

Q. Okay, Doctor, your opinion at this point would be that Gary Alvord is competent to stand trial?

A. That's correct.

Q. Okay. Thank you.

In response to questions by Meyers on cross-examination, Robey stated:

Q. Were you able to adequately make a determination on January the 18, 1973?

A. Of what, Mr. Meyers?

Q. Of his mental condition?

A. Oh, yes, sir. I think once you have obtained an adequate past history and get to know someone well, as little a period of time as thirty seconds to a minute can give us more than

adequate diagnostic information, again based on the fact that you already know the defendant, the patient, well.

* * *

A. Well, Mr. Meyers, I think I could give you many examples, both actual and certainly hypothetical ones that might be of greater assistance to the Court, where psychiatric diagnoses can be made in as little as five to ten seconds, if the symptoms are sufficiently overt But as I indicated previously in my testimony, when you get to know someone quite well, as I had Gary, a very few minutes will suffice. I am quite sure you yourself can go home at night and perhaps within five seconds know whether you wife is feeling happy, sad or—

Q. I won't argue with you.

Robey also testified that he was the doctor most familiar with Alvord:

Q. So, it's your opinion you know more about him than anybody else who was there?

A. That's correct.

The state trial court also based its findings on the report of Dr. Sprehe, who,

after repeated attempts to examine Alvord, reached the following qualified conclusions:

> Pursuant to your order I again tried to perform a psychiatric examination on Gary Eldon Alvord on 1/8/74. As you know, I tried to interview him on 10/9/73 but at that time he had refused to talk to me, stating that if I was a doctor he didn't want to talk to me even though I tried to explain my position at that time regarding being assigned by the court, etc. to talk to him. He stated that he was aware of his rights and that he didn't need to talk to anybody and therefore I was unable to perform a psychiatric examination.
>
> Since that time I talked to Dr. Ames Robey who was his doctor in Michigan when he was in the State Hospital there and Dr. Robey stated that he thought he had persuaded Mr. Alvord to be willing to talk to me but he wasn't sure, but at any rate that Mr. Alvord certainly understood his legal rights and his legal position and was certainly able to stand trial. This was the opinion of Dr. Robey.
>
> Armed with this information, I

again went to talk to Mr. Alvord on 1/8/74 and he again in a very friendly way refused to talk with me. He denied talking with Dr. Robey and stated that he had just fired his attorney and that he couldn't talk with me without an attorney present and that he had no wish to talk to me anyway and that he knows his rights and that his rights are that he must have an attorney present if he wants one whenever he is being interviewed by anyone. I tried to explain my neutral position and the fact that I am only appointed as an expert witness to examine him but he was unwilling to listen to my explanation and finally walked out of the interview room without further examination being conducted.

It is my definite impression that Mr. Alvord is mentally competent to stand trial and that he is able to understand the nature of the charges against him and that he is able to assist counsel in the preparation of his defense; however, this impression is offered on the basis of my brief meeting with him plus my conversation with his old psychiatrist, Dr. Ames Robey.

It appears from these record excerpts that Alvord received a constitutionally

adequate examination. We are not prepared to hold, as Alvord requests, that the state must commit all defendants to the state mental hospital for observation if they so request. We also are not prepared to invalidate Alvord's conviction because Robey, years after his pretrial examination, has expressed limited qualifications as to his conclusions.[20]

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[20] Robey stated at the district court's hearing:

> Q. Could you please describe to me the physical surroundings that you conducted your examination in?
> A. Well, initially, we just stood in the hall. There was no place to talk and during this period, there was really little could be done.
> After about ten or fifteen minutes, a bail bond cubbyhole became available. We used that for maybe another half hour or so and then finally one of the guards informed us hat a room was available and we stayed in that until eight-until 4:15.
> Q. Based on your medical qualifications in applying good psychiatric practice, do you

have an opinion as to the adequacy of that physical layout when conducting a psychiatric exam to determine competency to stand trial in a triple murder case?
A. Well, I think when you add the caveat that involve a tripe murder case, I would have to state that they are not only bad, they were totally unacceptable, although all that was available.
Q. Applying good psychiatric practice, do you have an opinion as to the adequacy of that particular room to conduct an examination to determine competency to stand trial and sanity at the same time of the offense in a triple murder case?
A. I have such an opinion.
Q. What is that opinion?
A. It is my opinion that, given the seriousness of the charges and given the potential for the death penalty, the facilities were totally inadequate and that there should have been hospitalization.
Q. Now, are you able to tell us whether or not you could have reached an opinion as a result of your examination on January 3 and January 4, but for the fact that you have available to you access to Gary Alvord's medical records?
A. Yes, sir. I feel that

without my prior knowledge of him, I could not have reached an opinion certainly in regard to criminal responsibility. In regard to competency, the major concern I had is that he might show this so-called hyper-competency syndrome of the paranoid individual who knows all the law. He doesn't really know how accurate it is, but he known it all and is very upset about what is going on.
Had I been able to talk to Mr. Meyers, either during or subsequent to my initial evaluation and go back and make another, I suspect I would have been less sure of his competency, but I had more data any anyone else and it made it easier for me, but the situation

even on competence was hardly adequate.

* * *

It is my opinion that while I personally don't hold any great grief for or against the death penalty, it is somehow terrible permanent and I feel it is extremely important in such cases to not only have at least three psychiatrists, but to have the opportunity made available for them to get every last bit of significant data concerning

IV. MIRANDA VIOLATIONS

At trial, the police officer who arrested Alvord in Michigan testified over an objection that, when arrested, Alvord stated, "I'm a rapist, not a ... thief." Alvord contends that the trial court should have excluded this testimony under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), because: (1) the officer did not advise Alvord of his right to have appointed counsel; (2) Alvord never signed a written waiver of

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> the patient's whole life history and really, without a hospital setting which will also provide day to day observations, you simply can't do this in a jail setting.
>
> Robey's testimony at the pretrial hearing demonstrates that he entertained no similar reservations then. The state need not anticipate such reservations, not raised at trial, first voiced when the execution of the death sentence becomes imminent.

his rights; and (3) Alvord's statement was involuntary because he lacked the capacity to understand what he was saying, see Blackburn v. Alabama, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960). The district court properly rejected these arguments.

In Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974), the Supreme Court addressed the effect of a warning faulty for the identical reason at issue here—failure to include notice of right to appointed counsel—and held that the omission did not render the statements inadmissible. The Florida Supreme Court affirmed Alvord's conviction on the basis of Michigan v. Tucker, see Alvord v. State, 322 So.2d 533, 537 (Fla.1975); we agree with the Florida Court that this case and Tucker are indistinguishable. It is also clear that the failure of the

officer to obtain a written waiver does not render the statement inadmissible. North Carolina v. Buller, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979).

Finally, we do not find Alvord's reliance on Blackburn v. Alabama persuasive. In that case the defendant was arrested and interrogated; shortly after the interrogation he was adjudicated insane. Four years later he was found competent to stand trial and his confession was admitted against him. 361 U.S. at 200-02, 80 S.Ct. at 276-77. The Supreme Court held that (despite the trial court's finding that the confession was voluntary) the confession should not have been admitted in light of substantial evidence that the defendant was incompetent when he confessed. Id. at 203-05, 80 S.Ct at 278-79. We face here a different situation. The trial judge had

before him substantial evidence of Alvord's competency (and of the voluntary nature of the confession). Under 28 U.S.C. § 2254(d), we must afford the finding of competency a presumption of correctness; and, in this case, nothing appears that upsets this presumption. See generally Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981).

VI. UNCONSTITUTIONAL RESTRICTION OF JURY'S CONSIDERATION OF MITIGATING CIRCUMSTANCES

In Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the Supreme Court held that the "sentencer [must] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id. at 604, 98

S.Ct. at 2964 (emphasis in original) Alvord contends that the jury instructions at the sentencing hearing violated the Lockett rule by limiting the jury to considering only statutory mitigating circumstances. See Washington v. Watkins, 655 F 2d 1346, 1377 (5th Cir. Unit A 1981) (invalidating sentence on basis of faulty instructions), cert. denied, 456 U.S. 949, 102 S.Ct 2021, 72 L.Ed.2d 474 (1982). The district court correctly analyzed and resolved this issue.

The judge instructed the jury in this case that the "aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence ..." and then listed the statutory aggravating circumstances. The judge then instructed the jury that the "mitigating circumstances which you may consider if established by the evidence

are these . . ." and then listed the statutory mitigating circumstances. In Ford v. Strickland, 696 F.2d 804 (11th Cir.1983) (en banc),

> Instructing the jury on aggravating circumstances, the trial judge stated, "[y]ou shall consider only the following ...," and read the statutory language. With regard to mitigating circumstances, he said, "[y]ou shall consider the following . . .," omitting the word "only" and again reading the appropriate statutory language.

Id. at 811-12. We see no distinction of importance between the language used in Ford and that used in the present case. In neither situation did the trial judge commit the error present in Washington v. Watkins, in which the charge "operated affirmatively to preclude jury consideration of nonstatutory mitigating factors." 655 F.2d at 1377 (footnote omitted). Also, in both this case and Ford

the judge permitted the defendant freely to introduce evidence without regard to its statutory- relevance.[21] Thus, the sentence is not invalid under Lockett.

VII. PROPORTIONALITY REVIEW

Alvord's final claim is that the Florida Supreme Court failed to conduct an adequate proportionality review in this case because the "Court's comparison makes absolutely no reference to the characteristics of the offender in each prior case, comparing instead, only the facts of the crime .... In addition, [the

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[21] For example, the judge allowed Robey to testify that Alvord could be rehabilitated. Meyers relied heavily in this case on the statutory mitigating factor that Alvord was unable to conform to the requirements of the law as well as the extreme mental disturbance factor. Given the thrust of Meyers' defense, testimony establishing nonstatutory mitigating evidence was of limited value in any event. See supra note 15.

opinion does not review] all cases of a similar nature in imposing the sentence of death." We have read the opinion of the Florida Court and we find the review beyond challenge The Court stated:

> It is our responsibility to review the sentence in the light of the facts presented in the evidence, as well as other decisions, and determine whether or not the punishment is too great See State v. Dixon [283 So.2d 1 (Fla.1973)], supra. Three murders were committed while the perpetrator was engaged in the commission of the felony offense of burglary. Each of the murders was especially heinous, atrocious and cruel in that the homicides were committed through strangulation by use of a rope. This could only be accomplished through a cold, calculated design to kill, as distinguished by a single shot from a firearm during an outburst of anger. The great risk of serious bodily harm by death to other persons is apparent, in that defendant obviously murdered two of the victims in order to avoid a surviving witness to the murder of the other victim. The murders were not committed under circumstances which defendant

believed to provide a moral justification or extenuation for his conduct and his capacity to conform his conduct to the requirements of law was not impaired. His age, 26 years, had no particular significance. These aggravating circumstances outweigh any circumstances which would mitigate the sentence in this case.

There is no way that the Legislature could program a judicial computer with all of the possible aggravating factors and all of the possible mitigating factors in each case. See State v. Dixon, supra. The law does not require that capital punishment be imposed in every conviction in which a particular state of facts occur. The statute properly allows some discretion, but requires that this discretion be reasonable and controlled. No defendant can be sentenced to capital punishment unless the aggravating factors outweigh the mitigating factors However, this does not mean that in every instance under a set state of facts the defendant must suffer capital punishment.

The statute contemplates that the trial jury, the trial judge and this Court will exercise reasoned judgment as to what factual situations require the

imposition of death and which factual situations can be satisfied by life imprisonment in light of the totality of the circumstances present in the evidence. Certain factual situations may warrant the infliction of capital punishment, but, nevertheless, would not prevent either the trial jury, the trial judge, or this Court from exercising reasoned judgment in reducing the sentence to life imprisonment. Such an exercise of mercy on behalf of the defendant in one case does not prevent the imposition of death

by capital punishment in the other case.

Sullivan v. State [303 So.2d 632 (Fla 1974)], supra, involved a death sentence which was held to be appropriate by this Court. During the course of a robbery defendant abducted the victim, struck him with a tire iron, and shot him with both barrels of a shotgun in the back of the head. The defendant reloaded and discharged both barrels again into the victim's head. Just as in Sullivan, this case involves the commission of a burglary and the murder of the victim. The deliberate actions of Sullivan in repeatedly shooting the victim is no less heinous and atrocious than the actions of

defendant Alvord in deliberately strangling three women with a rope.

Gardner v. State, 313 So.2d 675 (Fla 1975), was an appeal from a death sentence for the murder of a female. The murder was accomplished by the use of a blunt instrument, the victim's body containing at least 100 bruises, abrasions and contusions. There was a massive hemorrhage of the pubic area. The victim was beaten so badly that the murder was looked upon as being especially heinous, atrocious and cruel. These aggravating circumstances outweighed any mitigating circumstances and the death penalty was upheld. Certainly, the atrocious manner in which Gardner murdered his victim is no more atrocious or heinous than the atrocious manner in which Alvord coldly strangled three females while committing his burglary.

A female victim was involved in Hallman v. State, 305 So.2d 180 (Fla.1974). The defendant committed the crime of robbery, cut the victim about the throat and neck with broken glass, slitting her throat and causing her death. Hallman had been convicted of two previous crimes involving an assault upon a young woman with a dangerous

> weapon. Alvord had been involved with the rape of a young girl in Michigan, and the evidence indicated that an assault was made upon the deceased Lynn, who was 18 years of age. The act of Hallman in cutting the victim with broken glass is no more heinous than the strangulation of three women by Alvord. Comparing the aggravating and mitigating circumstances with those shown in other capital cases and weighing the evidence in the case sub judice, our judgment is that death is the proper sentence.
>
> Pursuant to Rule 6.16(b), Florida Appellate Rules, we have reviewed the evidence to determine whether the interest of justice requires a new trial. No reversible error is made to appear and the evidence does not reveal that the ends of justice require that a new trial be awarded. We find that the judgment and sentence of the trial court in this cause is in accordance with the justice of the cause.

Alvord v. State, 322 So.2d 533, 540 41 (Fla. 1975).

Since the briefs were submitted in this case, the Supreme Court issued its

decision in Pulley v. Harris, ___ U.S.___, 104, S.Ct. 871, 78 L.Ed.2d (1984). In Pulley, the Supreme Court held that the Constitution does not require a state to conduct proportionality reviews, provided that its "capital sentencing system [is not] so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review .... " Id. at ___, 104 S.Ct. at 873. Like the California system, the Florida system requires that "special circumstances," id must be found before the sentence of death may be imposed in a given case. See generally Barclay v. Florida, ___ U.S. ___ , 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct 2960, 49 L.Ed.2d 913 (1976). The Florida system also contains other checks on the discretion of the sentencing authority so

often discussed that we need not repeat them here. See id. Thus, in light of Pulley, Florida is not required to conduct a proportionality review. Alvord does not contend that he was the victim of an unequally applied proportionality review, and the review he received was as extensive as is given by the State of Florida. Thus, his attack on his death sentence on this ground is without merit.

The opinion of the district court is REVERSED in part and AFFIRMED in part.

Gary Eldon ALVORD, a/k/a Paul Robert Brock, a/k/a Gary Eldon Venczel, Petitioner-Appellee, Cross-Appellant,

v.

Louie L. WAINWRIGHT, Secretary, Department of Corrections, Respondent Appellant, Cross-Appellee.

No. 83-3345.

United States Court of Appeals, Eleventh Circuit.

April 25, 1984.

Appeals from the United States District Court for the Middle District of Florida.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion February 10, 1984, 11 Cir., 1984, 725 F.2d 1282).

Before HILL and FAY, Circuit Judges, and ALLGOOD,* District Judge.;

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* Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

PER CURIAM:

Gary Eldon Alvord has moved that this court grant a rehearing in his case, Alvord v. Wainwright, 725 F.2d 1282 (11th Cir. 1984). In section IV of our opinion, at 1298-99, we concluded that the contended failure of the police officer to advise Alvord of his right to have a lawyer appointed if he could not afford one would not render his statement inadmissible. Alvord argues that Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974), does not support our conclusion.[22] In appraising this

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[22]a. In his petition for rehearing, Alvord points out that the court in Michigan v. Tucker relied in part on the timing of Tucker's arrest. Tucker was arrested before the Court issued its decision in Miranda; however, because he was tried after Miranda, the decision applied at his trial. Michigan v. Tucker, 417 U.S. at 435, 94 S.Ct. at 2359. The Court stated that the protections of

contention, we have made a further complete review of Alvord's trial, and we substitute the following for the second full paragraph of section IV of our opinion.

We find both of Alvord's arguments that are directed to the adequacy and form of his Miranda warnings to be without merit. First, it is clear that the failure

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Miranda are not constitutional, but "prophylactic," id. at 439, 94 S.Ct. at 2361, thus causing some commentators to question the constitutional basis of the Miranda rule and its continuing vitality in habeas corpus proceedings. See, e.g., Stone, The Miranda Doctrine in the Burger Court, 1977 Sup.Ct.Rev. 99, 115-25. Nevertheless, the Court also stated that "[w]e consider its significant that the officers' failure to advise respondent of his right to appointed counsel occurred prior to the decision in Miranda, 417 U.S. at 447, 94 S.Ct. at 2365, thus limiting its holding so that it does not directly govern this case. We perceive the effect of the Michigan v. Tucker case to be, at best, unclear; we therefore decide on rehearing to refuse to rely on that case. We need not address Michigan v .Tucker's applicability in this case given our present resolution of the issue.

of the officer to obtain a written waiver in no way rendered the statement inadmissible. North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979). Second, the record does not support Alvord's contention that the officer failed to advise him of his right to have counsel appointed if he could not afford one. The state trial court conducted a hearing, out of the presence of the jury, to determine the admissibility of the officer's testimony. There was no testimony that the officer did not give full Miranda warnings and advice. The officer stated at the hearing that he advised Alvord of his rights as follows:

> Q. Okay. And did you, in fact, talk to him?
> A. Yes, sir, I did.
> Q. Okay. Did you advise him of his rights?
> A. Yes, sir, I did.

Q. And what did you tell him regarding his rights?
A. First of all I advised him that, who I was. I advised him who I was and that I was a detective with the Police Department in Lansing. I advised him that he didn't have to talk to me, that anything he said would be used in court against him. I advised him that he had to, he had a right to an attorney. He had a right to have an attorney present before he answered any questions or made any statement.
Q. All right. Did he request to have an attorney?
A. No sir, he did not.
Q. Did he request to remain silent?
A. No, sir, he did not.
Q. Did you or anyone in your presence promise him anything in order for him to make a statement?
A. No, sir.
Q. Did you or anyone in your presence threaten him to make a statement?
A. No, sir.
Q. Did you promise him immunity if he made a statement?
A. No, sir.
Q. Did you coerce him in any way to make a statement?
A. No, sir.

Q. Did he indicate whether or not he understood his rights?
A. Yes, sir. he told me he was aware of his rights.
Q. All right. And then what did you say to the defendant, Gary Alvord?
A. At this time I advised him that I wanted to talk to him about a safe job.
Q. Okay. What did he say?
A. Just looked at me and said, "I am a rapist, not a God-damn thief."
Q. And what did you say at that point?
A. I said, "What do you mean by that"?
Q. What did he say?
A. He then said, "I am wanted in Florida for three murders."
Q. And what did you say?
A. I said, "I thought it was two."
Q. What did he say?
A. He said, "Maybe they forgot one."
Q. And what did you say to that?
A. I looked at him and said, "Did you do it?"
Q. And what did he respond?
A. He said, "They will have to prove it."
Q. Okay. Anything further regarding the conversation?

At this point, the officer testified that Alvord indicated that he had nothing more to say. There was no other testimony taken on the sufficiency of the Miranda warnings.

The trial judge refused to admit any testimony as to Alvord's prior misconduct (which consisted of the officer's statement that Alvord was suspected of committing a burglary) except Alvord's comment that he was a rapist. In the presence of the jury (with the exception of the burglary testimony) the officer's testimony was in all material respects the same as his testimony at the exclusion hearing.

In this habeas corpus proceeding, Alvord must prove his right to relief by a preponderance of the evidence. It is not the state's responsibility to prove that Alvord received the proper warnings; it is

Alvord's responsibility to prove that he did not. Corn v. Zant, 708 F.2d 549, 563 (11th Cir.1983); Hill v. Linahan, 697 F.2d 1032, 1036 (11th Cir.1983); Henson v. Estelle, 641 F.2d 250, 253 (5th Cir.), cert. denied, 454 U.S. 1056, 102 S.Ct. 603, 70 L.Ed.2d 593 (1981). Alvord relies solely on the above excerpt as proof of his contention that the officer did not advise him of his right to have counsel appointed for him. At the evidentiary hearing in the district court, 564 F.Supp. 459, Alvord made no effort to elaborate on the officer's testimony as it appears in the state transcript.[22] From the transcript, we conclude that Alvord failed to meet his burden of proof.

The transcript demonstrates that the

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[22]b. On cross-examination, the officer reiterated that Alvord had assured him that he understood his constitutional rights.

officer affirmatively testified that he advised Alvord of his Miranda rights. See supra italicized portion of transcript excerpt. Despite this affirmative testimony, Alvord seeks to establish that the officer did not properly repeat the warnings by relying on the officer's testimony that he informed Alvord of his "right to have an attorney present before he answered any questions or made any statement." Alvord relies, apparently, on the officer's failure specifically to mention that Alvord was entitled to appointed counsel; this does not prove that the officer did not properly inform Alvord of his rights.

The officer testified without qualification that he gave Alvord the proper warnings. The failure of the officer to use the word "appointed" when reviewing the contents of those warnings

does not establish that his previous testimony was incorrect or incomplete. First, the officer did not attempt to explicitly state the warnings, and he was not requested to do so. Alvord's attorney cross-examined the officer, but never attempted to establish the deficiency Alvord now asserts. He attempted to establish other deficiencies in the warning. Second, the officer's informal reference to Alvord's "right" to counsel certainly is a clear enough shorthand method for referring to the right to counsel regardless of ability to pay. The officer testified to an unqualified "right" to counsel; this is not a case, as was Lathers v. United States, 396 F.2d 524, 533 (5th Cir.1968), in which the officer testified, "we don't furnish attorneys ... they have the prerogative to call one." Indeed, the Supreme Court,

itself, has summarized the essence of the Miranda warnings in a fashion remarkably similar to that used by this officer:

> "In Miranda v. Arizona, the court determined that the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination required that custodial interrogation be preceded by advice to the putative defendant that he has the right to remain silent and also the right to the presence of an attorney. 384 U.S. [436], at 479 [86 S.Ct. 1602, 1633, 16 L.Ed.2d 694]. The Court also indicated the procedures to be followed subsequent to the warnings. If the accused indicates that he wishes to remain silent, "the interrogation must cease." If he requests counsel, the interrogation must cease until an attorney is present." Id, at 474 [86 S.Ct. at 1627].

Edwards v. Arizona, 451 U.S. 477, 481-82, 101 S.Ct. 1880, 1883, 68 L.Ed.2d 378 (1981) (emphasis added). The officer's summary of Miranda warnings, which was as complete as the Court's, was adequate. Absent any caveat to his testimony that

Alvord had been given his rights, there is no proof that he was not. Alvord has thus failed to meet his burden of proving that he did not receive the proper warnings. With these additional observations, the petition for rehearing is DENIED.

No member of this panel or judge in regular service on the court having requested that the court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for rehearing en banc is

DENIED.

No. 83 6807. Gary Eldon Alvord, Petitioner v. Louie L. Wainwright, Secretary, Florida Department of Corrections

469 US 956, 83 L Ed 2d 291, 105 S Ct 355.

October 29, 1984. The petition for a writ of certiorari is denied.

Same case below, 725 F2d 1282.

Justice Marshall, with whom Justice Brennan joins, dissenting.

This petition asks us to consider whether an attorney renders effective assistance of counsel when he forgoes all investigation into his client's only plausible line of defense and defers to his client's wishes on defense strategy, without any regard for the client's knowledge of, or ability to understand, the law, the facts, or the ramifications of the decision.

The question could scarcely be more starkly posed. The petitioner here had previously been adjudicated insane at a criminal trial, and his reasoning faculties were therefore highly suspect. Yet appointed counsel accepted his client's initial refusal to rely on the insanity defense, made no independent investigation of his client's mental or criminal history, learned no facts that would enable him to persuade his client to change his mind, and instead permitted his client to rely on an unsupported alibi that all acknowledged to have been, at best, weak. The lower court approved this course of conduct on the ground that the client was found competent to stand trial and therefore was entitled to have his wishes followed. Because I believe the lower court decision seriously misconstrues the constitutional role of a

criminal defense lawyer, I would grant certiorari to review the decision.

I

The record demonstrates unequivocally that Gary Alvord has a long history of mental illness. He first entered a mental hospital at age 13. In 1967, he was charged in Michigan with rape and murder; he spent two years in a mental hospital and was then declared competent to stand trial. At a bench trial, he was found not guilty by reason of insanity and was committed to the custody of the Michigan Department of Mental Health. After escaping from the Ionia State Hospital in Michigan, he traveled to Florida, where he committed the three murders for which he received the death sentence in Florida.

Counsel, a part-time public defender, was appointed to represent Alvord after

his indictment in 1973. Alvord refused to talk to the lawyer; instead, it was the prosecutor who told counsel that Alvord had been adjudicated not guilty by reason of insanity in Michigan. Counsel moved for a mental examination, and two psychiatrists were directed to conduct the examination. Ultimately, the trial judge ruled that Alvord was competent to stand trial.[1]

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[1] Alvord declined to talk to the two psychiatrists unless his lawyer was present. His lawyer did not attend the meetings, and the psychiatrists were unable to give an opinion on his mental state. Thereafter, the State brought in one of the psychiatrists who had known Alvord in Michigan. Alvord spoke with him, and the psychiatrist concluded that Alvord was competent to stand trial. The two other psychiatrists then sought to interview Alvord again. One of them concluded that he was competent to stand trial. The other declined to draw a conclusion. The trial judge then determined that Alvord was competent to stand trial.

Appointed counsel saw Alvord for about 15 minutes after Alvord was indicted. Counsel's subsequent pretrial contact with his client was primarily at court hearings. According to the Court of Appeals, Alvord's counsel conducted no independent investigation into Alvord's history of mental illness. He did not contact doctors, other than one brought in by the State to interview Alvord, see n 1, supra, at the Michigan hospital where Alvord had spent considerable time, and he only obtained a small portion of Alvord's medical record. He made no effort to have that portion of the medical record examined and interpreted by a psychiatrist. He did not offer to the court any document or testimony indicating that Alvord had previously been adjudicated incompetent, even after the trial judge observed that no such evidence

was presented. Nor did he raise at trial the presumption of insanity afforded Alvord under Florida law, because of his prior adjudication of insanity, the effect of which would have been to place the burden of proof on the prosecution to prove sanity beyond a reasonable doubt.[2] Nor, apparently, did counsel even inform Alvord of this legal principle and its potential consequences. Finally, counsel apparently did not contact the attorney who represented Alvord during the Michigan prosecution, who would have told him that Alvord initially had been disinclined to assist in his best defense there as well,

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[2] See Livingston v. State, 383 So.2d 947 (Fla. App. 1980) (Florida presumes insanity, once one has been adjudged insane, until it is shown that sanity has returned); Hixon v. State, 165 So.2d 436, 439 (Fla. App. 1964) (reversing conviction for failure of prosecutor to overcome defendant's presumption of insanity, which had been established in a prior Ohio adjudication).

until he had come to trust counsel.[3] "In short, [counsel] undertook virtually no investigation of the one defense [counsel himself] considered viable in Alvord's case, choosing instead to comply with

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[3] At the federal habeas hearing, one of Alvord's Michigan psychiatrists testified:

> "Now, as his lawyer, at that time, Mr. Richey, was a very competent individual. Mr. Alvord would not cooperate and initially we were feeling very much we were going to again have to find him incompetent, but we had a sixty day period during this, worked with him, and I think it was after about a month we finally got sufficient work done to cooperate, but this took a lot of work on Mr. Richey's part in terms of seeing him, letting him know what was going on, letting him feel that he really was being represented, and I worked with him during this period also. <u>But, there was a built in core of feeling about lawyers and the same thing was seen here, so that the similarity was certainly a warning.</u>" Pet for Cert 14 (emphasis added).

Alvord's request that he put petitioner on the stand and proceed with an alibi defense." 564 F Supp 459, 471 (MD Fla 1983). The lower court opinions and findings establish that counsel made absolutely no effort to pursue the possibility of an insanity defense, after his unstable client's uneducated objection to the possibility, but instead unquestioningly accepted his client's direction to pursue a frivolous alibi defense.

The federal habeas court rejected Alvord's claim on the ground that counsel acted reasonably in deciding that it would be useless to pursue an insanity defense because Alvord would not cooperate. Id., at 473-474. This argument wholly misses the mark. The question is whether counsel had a duty to investigate his client's case and make a minimal effort to persuade

him to follow the only plausible defense. The question is not whether counsel has a duty to override his client's wishes, or pursue fruitless investigations, thereafter. The Court of Appeals adopted the District Court's reasoning and also observed that Alvord had been found competent to stand trial—in part because counsel had failed to present to the court evidence of the prior insanity adjudication—and that counsel "was ethically bound to follow his client's wishes" as a result. 725 F2d 1282, 1289 (CA11 1984). This holding is the crux of the decision. With this ruling, the Eleventh Circuit has loudly and clearly signalled that counsel need not question a client's decisions on crucial trial issues as long as the client is found competent to stand trial, even if counsel's professional judgment suggests to him that

an alternative decision would be in the client's best interests.

II

It is crucial to recognize precisely what is at issue here. The lower courts in this case have interpreted our decisions to hold that counsel has absolutely no obligation to investigate, at all, the only plausible defense a defendant might have, and no obligation to provide advice on that issue, once the defendant indicates a desire not to pursue that defense, even when the client's reasoning faculties are highly suspect. The decision establishes that absolute deference to the uninformed reaction of a defendant is acceptable, and that counsel's decision not to pursue the issue and make an attempt to persuade his client is reasonable.

This result renders meaningless defense counsel's vital function as an adviser. Counsel must ensure that the client has access to information relevant to the pretrial and trial decisions that the accused must make himself, such as whether to testify on his own behalf, to waive a jury trial, or to plead guilty.[4]

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[4] The lower court ruling is therefore premised on a significant understanding of the division of responsibility between counsel and client at trial, and of the obligation of counsel to inform himself and advise his client, as set out in the ethical standards of the American Bar Association. As this Court recognized last Term, those standards act as guides in determining the reasonableness of counsel's assistance. See Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). The ABA's Standards of Criminal Justice, Part V, entitled Control and Direction of Litigation, are especially relevant. That section provides: "Standard 4-5.1. Advising the defendant

> "(a) After informing himself or herself fully on the facts and the law, the lawyer should advise the accused with complete candor considering all

Each of these decisions involves the waiver of a constitutional right and must be made by the accused, but with the

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> aspects of the case, including a candid estimate of the probable outcome.

Standard 4-5.2. Control and direction of the case

> "(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decision which are to be made by the accused after full consultation with counsel are:
>
> "(i) what plea to enter;
> "(ii) whether to waive jury trial; and
> "(iii) whether to testify in his or her own behalf.
> "(b) The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic ad tactical decisions are the exclusive province of the lawyer after consultation with the client." ABA Standards for Criminal Justice 4-5.1, 4-5.2 (2d ed 1980 and Supp 1982).

advice of counsel. Counsel's role is to provide advice that will assure not only that the waiver is voluntary and intelligent, but also that the accused is reasonably well informed. See McMann v. Richardson, 397 US 759, 769-770, 25 L Ed 2d 763, 90 S Ct 1441 (1970). Thus, if pursuit of an insanity defense is a decision to be made by the accused, it must be done on the advice of a well-informed attorney who has assured that his client has based his decision on relevant information.[5]

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[5] Ethical Consideration 7-7 of the American Bar Association Code of Professional Responsibility suggests that the decision on an insanity defense might ultimately be one for the client, but that it must be made after the lawyer has fully informed himself and his client on the issue. The section reads in pertinent part:

"A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the

Of course the need for assistance of counsel extends well beyond assistance in deciding whether to waive constitutional rights. The Sixth and Fourteenth Amendments embody "a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced

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prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken."

Ethical Consideration 7-8 provides that "[a] lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations." ABA/BNA Lawyers' Manual on Professional Conduct 01:332-01:333 (1984). Under the lower court ruling, however, once a presumptively insane client has made a decision that is obviously prejudicial, the attorney has no obligation to try to persuade his client otherwise by informing him of relevant considerations.

and learned counsel." Johnson v. Zerbst, 304 US 458, 462-463, 82 L Ed 2d 1461, 58 S Ct 1019, 147 ALR 357 (1938). Thus, counsel is authorized to make certain choices for his client, after consultation with the client, during which counsel, who is fully informed of the facts, discusses the options with his client. As this Court has noted, "[w]ith the exception of [the three] specified fundamental decisions [involving waiver of constitutional rights], an attorney's duty is to take professional responsibility for the conduct of the case, after consulting with his client." Jones v. Barnes, 463 US 745, 753, n 6, 77 L Ed 2d 987, 103 S Ct 3308 (1983). When counsel is obliged to make the decision himself, blind deference to a client's wishes, without any investigation, is unquestionably

inappropriate and constitutionally ineffective.

Thus, regardless of whether the ultimate decision on an insanity defense is that of the attorney or his client, counsel must fully inform himself of the facts and law, make a reasonable investigation into the only plausible line of defense, and share his conclusions with his client. This is the essence of effective assistance of counsel. This conclusion, which I would have thought to have been well ingrained in our Sixth Amendment jurisprudence, is wholly at odds with the view that a lawyer reasonably may assume that his client—no matter what his training or mental capacity—has based his decision on sufficient information and knowledge as to render the lawyer's further effort unnecessary. To my mind, such total deference is only proper, if at

all, when counsel has good reason to assume that his client's decisions are based on an intelligent and informed understanding of his situation.

Moreover, the analysis and result below are inconsistent not only with fundamental principles of the role of counsel, but also with a decision in another Circuit, thereby rendering this case particularly appropriate for certiorari. In contrast to the Eleventh Circuit, the Fourth Circuit has affirmed the grant of a habeas petition when counsel had totally failed to develop the only conceivable defense at the defendant's state trial, and had neglected to advise the defendant properly as to his legal alternatives. See Brennan v. Blankenship, 472 F Supp 149 (WD Va 1979), aff'd, 624 F2d 1093 (1980). In Brennan, counsel had permitted himself to be guided

by the defendant's aversion to insanity pleas. The court applied the "normal level of competence" test and found that under any professional standard, it was improper for counsel to rely blindly on the statement of a criminal client whose reasoning abilities are highly suspect, and that counsel at least had a duty to investigate and try to persuade his client. As the court wrote, "[g]iven the attorneys' reasonable conclusion that there was no other factual defense or factors in mitigation, it is almost incredible that the attorneys did not press Brennan on the point." 472 F Supp, at 156. Neither the Court of Appeals, nor any papers filed here, come even close to distinguishing this case.

III

In this case, defense counsel avoided all responsibility to investigate his client's only plausible defense, to inform his client of the legal ramifications of an insanity plea (of which it is far from certain counsel was even aware), to assure that the decision was not based on a lack of information, to talk with psychiatrists to determine whether his client understood the ramifications of his decision, to talk with prior counsel to discover that Alvord had in the past hesitated to trust counsel until he was made to feel he was being properly represented, to consider whether the insanity defense was a strong one, or to find out that Florida law would have shifted the burden of proof on insanity because of Alvord's prior insanity adjudication. Prior to trial, he met with his client—the client who was facing trial

for three capital murders—for only 15 minutes outside of court. During this time, his client was in jail, under suicide watch, with no lights in his cell, no furniture except a mattress, no blanket, and no clothing. Also during this time, Alvord refused to talk with psychiatrists unless his lawyer was present, yet his lawyer never visited him in jail, nor attended the interview sessions. It is difficult to imagine how the trial would have differed had Alvord had no counsel at all. There can be little doubt that under almost any standard other than that recognized by the lower courts, counsel's assistance here would be considered constitutionally ineffective.

IV

I continue to adhere to my view that the death penalty is in all circumstances

cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. See Gregg v. Georgia, 428 US 153, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976) (Marshall, J., dissenting); Furman v. Georgia, 408 US 238, 314, 33 L Ed 2d 346, 92 S Ct 2726 (1972) (Marshall, J., concurring). But even if I did not so believe, I would grant certiorari in this case. The lower court has countenanced a view of counsel's constitutional duty that is blind to the ability of the individual defendant to understand his situation and usefully to assist in his defense. The result is to deny to the persons who are most in need of it the educated counsel of an attorney. To avoid that result, I would grant the petition. I dissent from the Court's refusal to do so.

Gary Eldon ALVORD, Petitioner,

Richard L. DUGGER, etc., et al., Respondents.

No. 71192.

Supreme Court of Florida.

Feb. 9, 1989.
Rehearing Denied May 11, 1989.

PER CURIAM.

Gary Eldon Alvord petitions this Court for a writ of habeas corpus and seeks a vacation of his death sentence and a new trial or, in the alternative, a new sentencing proceeding. We have jurisdiction. Art. V, § 3(b)(1), (9), Fla. Const. We deny relief.

The evidence at trial demonstrated that Alvord entered and burglarized the house of Ann Herrmann. During the burglary, he committed three murders by using a piece of cord and strangling Ann, her mother, Georgia Tully, and her

daughter, Lynn Herrmann. Further, a vaginal test on Lynn revealed semen. On April 9, 1974, the jury convicted Alvord of three counts of first-degree murder. The jury recommended the death penalty, and the trial judge imposed that sentence. This Court affirmed both the conviction and the death sentence in Alvord v. State, 322 So.2d 533 (Fla.1975) [Alvord I], cert. denied, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976).

On November 29, 1976, Alvord filed a motion, pursuant to Florida Rule of Criminal Procedure 3.800, seeking a reduction in his sentence. The trial court denied the motion, and, on review, this Court denied his petition for a writ of mandamus in an unreported order on March 10, 1977 [Alvord II].

On October 6, 1978, Alvord filed a motion for post-conviction relief pursuant

to Florida Rule of Criminal Procedure 3.850. The trial court denied the motion and this Court affirmed that decision. Alvord v. State, 396 So.2d 184 (Fla.1981) [Alvord III]. Alvord then sought relief in federal court by filing a petition for a writ of habeas corpus. Alvord v. Wainwright, 564 F.Supp 459 (M.D.Fla.1983). After the district court granted part of the petition with respect to the penalty phase, id. at 490-91. the Eleventh Circuit Court of Appeals reversed and held that both the conviction and the sentence should be affirmed. Alvord v. Wainwright, 725 F.2d 1282 (11th Cir.), cert. denied, 469 U.S. 956, 105 S.Ct. 355, 83 L.Ed.2d 291 (1984). The failure to allow nonstatutory mitigating circumstances was addressed and rejected in that federal court proceeding. Id. at 1299.

On November 20, 1984, Alvord petitioned this Court for a writ of extraordinary relief and requested a judicial determination of his competency to be executed separate from the existing procedure under section 922.07, Florida Statutes (1983). This Court denied that petition in Alvord v. State, 459 So.2d 316 (Fla.1984) [Alvord IV].

Alvord initially presented the instant habeas corpus petition before this Court seeking (1) a stay of the mental examination directed by the governor to determine his competency to be executed and (2) a new sentencing proceeding because neither the trial judge nor the jury considered nonstatutory mitigating circumstances during the sentencing phase, in violation of the rule set forth by the United States Supreme Court in Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821,

95 L.Ed.2d 347 (1987). We denied the requested stay of the mental examination in an unreported order. Subsequently, Alvord filed an amended habeas corpus petition, adding the ground that we erred in affirming the trial court's admission of his statements when no proper warning of his right to counsel as an indigent was given. Here, he argues that since we subsequently recognized this specific error in Caso v. State, 524 So.2d 422 (Fla.), cert. denied, ___ U.S. ___ 109 S.Ct. 178, 102 L.Ed.2d 147 (1988) and expressly receded from our earlier holding in Alvord I, we should now rectify this error and grant a new trial. We granted oral argument on the Hitchcock and confession claims.

Hitchcock Claim

In Hitchcock, the United States Supreme Court held that, absent harmless error, resentencing was required when the jury was instructed to consider only evidence of statutory mitigating circumstances and the judge failed to consider nonstatutory evidence. Hitchcock v. Dugger, 107 S.Ct. at 1824. At the outset, we note that the state concedes a Hitchcock violation because all participants—the prosecutor, the defense counsel, and the trial judge-explained to the jury that it should limit consideration of mitigating circumstances to those enumerated in the statutes.

We recognize the Hitchcock error and must now determine whether the error was harmless. Hitchcock; Booker v. Dugger, 520 So.2d 246 (Fla.), cert. denied, ___ U.S. ___, 108 S.Ct. 2834, 100 L.Ed.2d 935

(1988); Delap v. Dugger, 513 So.2d 659 (Fla.1987). We have previously applied the harmless error analysis to Hitchcock violations, found harmless error, and denied new sentencing proceedings. See, e.g., Clark v. State, 533 So.2d 1144 (Fla.1988); Hall v. Dugger, 631 So.2d 76 (Fla.1988); Jackson v. Dugger, 529 So.2d 1081 (Flat 1988); Smith v. Dugger, 529 So.2d 679 (Fla.1988); Ford v. State, 522 So.2d 345 (Fla.1988), petition for cert. filed (July 19, 1988); Tafero v. Dugger, 520 So.2d 287 (Fla.1988); Booker; Demps v. Dugger, 514 So.2d 1092 (Fla.1987); Delap. On the other hand, we have found that certain Hitchcock violations did not meet the harmless error test and directed a new sentencing proceeding. See, e.g., Combs v. State, 525 So.2d 853 (Fla.1988); Zeigler v. Dugger, 524 So.2d 419 (Fla.1988); Mikeras v. Dugger, 519 So.2d 601

(Fla.1988); Riley v. Wainwright, 517 So.2d 656 (Fla.1987); Morgan v. State, 515 So.2d 975 (Fla.1987), cert. denied, ___ U.S. ___, 108 S.Ct. 2024, 100 L.Ed.2d 610 (1988); Downs v. Dugger, 514 So.2d 1069 (Fla.1987).

In the instant case, the trial judge, in imposing the death sentence, found the following three statutory aggravating circumstances: (1) the murders were committed during the commission of a burglary; (2) the murders were especially heinous, atrocious, or cruel; and (3) Alvord's conduct created a serious risk of death to many persons. The trial judge also found two statutory mitigating circumstances. He concluded that, during the commission of the crime, Alvord was under the influence of extreme mental or emotional disturbance and his capacity to

conform his conduct to the requirements of law was impaired.

Alvord now asserts that he was denied the opportunity to present nonstatutory mitigating evidence concerning among other things: (1) his capacity for rehabilitation; (2) the history of mental illness within his family; and (3) his traumatic life experiences while involuntarily committed to mental institutions. The latter two concern Alvord's mental condition which, to a large extent, was presented to both the jury and the judge. We find the mitigating evidence clearly insufficient to change the sentencing decision, given the circumstances in this case. Based on the record, we conclude that the Hitchcock error was harmless.

Confession Error

The record establishes that the trial court admitted Alvord's statements despite the investigating detective's improper Miranda warnings. Following the arrest, the detective read Alvord his rights but failed to explain that he had a right to appointed counsel if indigent. In Alvord I, we held that this failure to give the correct Miranda warnings did not preclude the evidence from being admitted. Alvord v. State, 322 So.2d 533 (Fla.1975), cert. denied, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976). However, in Caso v. State, we receded from that holding in Alvord and stated: "We therefore recede from that portion of Alvord which holds that the trial court did not err in admitting the custodial statements of the defendant." 524 So.2d at 425.

Recognizing that the admission of these statements was error, the question we must now address is whether this error was also harmless. During trial, the state presented testimony of numerous witnesses linking Alvord to the three murders. The principal part of the state's case was not Alvord's custodial statements but the testimony of his girlfriend, Zelma Hurley. She recounted a conversation she had with Alvord the morning following the murders. She testified that Alvord told her that he went over to Ann's house the previous night to "rub out" the victims; he entered the house after kicking the door in; he placed Ann, Lynn, and Georgia in separate rooms and strangled them; he did not want to strangle the older woman but did so to avoid witnesses; and he left the home with money. The importance of her testimony was reflected in Alvord's brief on direct

appeal where he stated: "The evidence on which the state primarily built its case was the testimony of Zelma Hurley. All of the remaining testimony put on by the state was subordinate in importance to Zelma Hurley's testimony." Appellant's Opening Brief at 9, Alvord v. State, 322 So.2d 533 (Fla.1975). In that brief, Alvord also stated:

> The evidence tending to connect the Defendant with the murders consisted of the following:
>
> First. While the State maintained that the murders were committed during the course of a burglary of Ann Herrmann's home, the State also offered evidence tending to show that the Defendant had harbored a dislike for Ann Herrmann before the date of the murders. Zelma Hurley testified that the Defendant had stated to her quite a few times that he disliked Ann Herrmann, and Jeanine Brautigan testified that about a month before the murders were committed the Defendant told her he could or would choke Ann Herrmann.

Second. The State introduced evidence tending to show that the Defendant had some of Ann Herrmann's jewelry in his possession after the date of the murders. Robert Bernstein who had dated Ann Herrmann for about 8 months, testified that he had given Ann Herrmann a blue, electric cigarette lighter with gold trim which was approximately 11/2" to 2" high. George Valahakis, Ann Herrmann's exhusband then testified that he had given Ann Herrmann a wedding ring and an engagement ring. The wedding ring contained a pear shaped diamond. and the engagement ring consisted of a diamond in the center surrounded by smaller diamonds. Mr. Valahakis also testified that he had given Ann Herrmann a Bulova, lady's watch, white-gold in color, with diamonds on each side of the watch where the band joined the watch. The band was also white-gold in color and it was an expandable type band.

The watch, the rings, and the lighter were never recovered and were not introduced in evidence at the trial. The State did, however, present testimony that the Defendant had similar appearing jewelry in his possession shortly after the murders were committed. Zelma Hurley testified that the Defendant had a gold and purple

> cigarette lighter, a pear shaped diamond ring, a ring with diamonds set in it in a flowered design, and a woman's watch with a small face and a stretch band in his possession on their trip to Pennsylvania shortly after the murders had been committed. Terri Williams who had seen the Defendant in Detroit, Michigan on June 25, 1973, testified that the Defendant had in his possession at that time a small woman's diamond watch with a stretch band.
>
> Third. The State introduced evidence tending to show that some physical evidence matching that found at the scene of the murders was later found in the apartment shared by the defendant and Zelma Hurley.
>
> The police found a short piece of rope in the apartment which was the same type of rope used to strangle the women, and a shirt which Zelma Hurley stated belonged to the Defendant was found in the apartment. The shirt had a small quantity of blood on it, but laboratory analysis could not identify it as to type or even identify it as human blood.
>
> ....

Id. at 7-9. We find that these circumstances distinguish the instant case

from Caso because in Caso the inadmissible testimony was the only real evidence linking the defendant to the murder. In this instance, Alvord's statements were clearly not the focus of this trial but were cumulative to the primary evidence presented by his girlfriend. In our view, the admission of the statements constituted harmless error.

After examining the record carefully, we find that there is no reasonable possibility that the Hitchcock error or the erroneously-admitted testimony contributed to the jury's verdict. See State v. DiGuilio, 491 So.2d 1129 (Fla.1986). Consequently, the errors, both individually and collectively, were harmless. For the foregoing reasons, we deny relief and the stay entered in this case is vacated.

It is so ordered.

EHRLICH, CJ., and OVERTON, McDONALD and SHAW, JJ., concur.

GRIMES, J., concurs with an opinion, in which EHRLICH, C.J., and McDONALD, J., concur.

KOGAN, J., dissents with an opinion, in which BARKEIT, J., concurs.

GRIMES, Justice, concurring.

While I agree that the admission of Alvord's statements can be considered as harmless error, I also believe that this Court's ruling in Caso v. State, 524 So.2d 422 (Fla.), cert. denied, ___ U.S. ___, 109 S.Ct. 178, 102 L.Ed.2d 147 (1988), should not be given retroactive effect even in this case. Caso involved the admissibility of a confession given after a defective Miranda* warning. Yet, the United States Supreme Court refused to

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* Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

give the Miranda decision itself retroactive application on the premise that a violation of the Miranda rule was less likely to affect the reliability of a confession than one induced by coercion. Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882, reh'g denied, 385 U.S. 890, 87 S.Ct. 12, 17 L.Ed.2d 121 (1966). Based on this rationale, both Florida, Nowlin v. State, 346 So.2d 1020 (Fla.1977), and the United States Supreme Court, Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), permit confessions obtained without proper Miranda warnings to be admitted for purposes of impeachment as long as the confessions are voluntary. Therefore, it is clear that the admission of Alvord's statements could not be deemed fundamental error.

In Alvord I, this Court interpreted Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974), as authority to hold that Alvord's statements could be admitted even though his Miranda warnings failed to include the advice that an attorney would be appointed to represent him if he were indigent. As a result of the United States Supreme Court's more recent interpretation of Michigan v. Tucker in Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), we found it necessary to recede from that position. However, the point was squarely decided against Alvord in Alvord I and only changed after a later Supreme Court decision demonstrated that we had previously misinterpreted Michigan v. Tucker. As related to any other defendant, this would constitute an evolutionary change in the law within the contemplation

of Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980), and I do not think that the principle is any different simply because it is Alvord who now complains.

EHRLICH, CJ., and McDONALD, J., concur.

KOGAN, Justice, dissenting.

I cannot agree that the admission of petitioner's statements in violation of Caso v. State, 524 So 2d 422 (Fla.), cert. denied, ___ U.S. ___, 109 S.Ct. 178, 102 L.Ed.2d 147 (1988), is harmless error. The state's case against petitioner rested primarily, and almost exclusively, upon the testimony of Zelma Hurley. Petitioner's statements of the police in Michigan corroborated and gave credibility to the testimony of Ms. Hurley. The state

in its closing argument o the jury put great emphasis on this statement and its importance in explaining the theory of the case. This error certainly cannot be classified as harmless.

I also cannot agree that the jury's inability to consider certain nonstatutory mitigating circumstances, such as petitioner having been a patient in mental institutions for twelve of the fourteen years preceding the commission of this crime while undergoing treatment as a paranoid schizophrenic, can be said to be harmless error beyond and to the exclusion of every reasonable doubt. The jury may have returned a recommendation of life imprisonment had it been permitted to consider this evidence and the trial judge in sentencing the petitioner might have been required to follow this recommendation under Tedder v. State, 322

So.2d 908 (Fla.1975), because the recommendation would have been reasonable.

I would grant the petition and vacate the petitioner's conviction and sentence and remand for the purpose of conducting a new trial as to both guilt and penalty.

BARKETT, J., concurs.

SUPREME COURT OF FLORIDA
WEDNESDAY, MAY 28, 1997

GARY ELDON ALVORD,	*	
	*	
Appellant,	*	
	*	
v.	*	CASE NO. 86,837
	*	
STATE OF FLORIDA,	*	Circuit Court
	*	No. 73-1398
	*	(Hillsborough)
Appellee.	*	

* * * * * * * * * * * * * * *

Appellant's Motion for Rehearing filed in the above cause is hereby denied.

OVERTON, SHAW, GRIMES, HARDING and WELLS, JJ., concur

KOGAN, C.J. and ANSTEAD, J., dissents

A True Copy TC

TEST:

By

Sid J. White
Clerk, Supreme Court

cc: Hon. Richard L. Ake, Clerk
Hon. Diana M. Allen, Judge
Mr. William J. Sheppard
Mr. Adam B. Allen
Ms. Elizabeth L. White
Mr. D. Gray Thomas
Ms. Candance Sabella

MANDATE

SUPREME COURT OF FLORIDA

To the Honorable, the Judges of the:

Circuit Court in and for Hillsborough County, Florida

WHEREAS, in that certain cause filed in this Court styled:

GARY ELDON ALVORD v. STATE OF FLORIDA

Case No.: *86,837*

Your Case No.: *73-1398*

The attached opinion was rendered on: **April 10, 1997**

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.

WITNESS the Honorable Gerald Kogan, Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital, on this 27th day of June, 1997.

_____

Clerk of the Supreme Court of Florida

IN THE CIRCUIT COURT OF THE
THIRTEENTH JUDICIAL
CIRCUIT, IN AND FOR
HILLSBOROUGH COUNTY,
FLORIDA, CRIMINAL
DIVISION

CASE NO: 73-1398

DIVISION - C

STATE OF FLORIDA

vs.

GARY ELDON ALVORD, a/k/a
PAUL ROBERT BROCK, a/k/a
GARY ELDON VENCZEL

SECOND MOTION FOR POST-CONVICTION RELIEF

Comes now the defendant, Gary Eldon Alvord, by and through undersigned counsel, pursuant to Fla. R. Crim. P. 3.850, and hereby brings this Petition for Post-Conviction Relief, alleging that he was improperly restricted from presenting and arguing to his sentencing jury certain non-statutory mitigating circumstances not found on the face of the record, in violation of his Eighth Amendment Rights

under the United States Constitution and Hitchcock v. Dugger, 481 U.S. 393 (1987). Defendant further alleges:

COURSE OF PRIOR PROCEEDINGS

1. Mr. Alvord was convicted and sentenced to death for three counts of first degree murder in 1974. His conviction and sentence were affirmed on direct appeal by the Florida Supreme Court in Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. den. 428 U.S. 923 (1976). Pursuant to Fla.R.Crim.P. 3.850 he filed a Motion for Post-Conviction relief, which alleged as one of its grounds the trial court's limitation by jury instruction of mitigating circumstances. Mr. Alvord's motion was denied by the trial court on August 27, 1979, and that denial was affirmed April 9, 1981. Alvord v. State, 396 So.2d 184 (Fla. 1981).

2. Thereafter, Mr. Alvord filed a petition for writ of habeas corpus in federal district court, which asserted as one of its grounds the limitation of mitigating circumstances. This petition was granted in part on the basis of Proffitt v. Wainwright, 685 F.2d 1227, 1266-1269 (11th Cir. 1982), however, the district court rejected petitioner's claim relating to the limitation of mitigating circumstances. Alvord v. Wainwright, 564 F.Supp. 459 (M.D. Fla. 1983). A new resentencing was ordered but, on appeal by the State, the district court's resentencing command was reversed by the Eleventh Circuit and Mr. Alvord's convictions and sentences were affirmed in all respects. Alvord v. Wainwright, 725 F.2d 1282 (11th Cir. 1984). Although the Eleventh Circuit rejected Mr. Alvord's claims relating to the restriction of

mitigating circumstances, it did so on grounds which have now specifically been rejected by the United States Supreme Court in Hitchcock and by the Florida Supreme Court in Riley v. Wainwright, 517 So.2d 656 (Fla. 1987); Downs v. Dugger, 514 So.2d 1069 (Fla. September 9, 1987); Thompson v. Dugger, 515 So.2d 173, 12 FLW 469 (Fla. September 9, 1987); Morgan v. State, 515 So.2d 975, 12 FLW 433 (Fla. 1987).[1]

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[1] The Eleventh Circuit held that there was no error in Mr. Alvord's sentencing proceeding because his counsel was allowed to present non-statutory mitigating circumstances during sentencing and the trial court did not instruct the jury that it could only consider the mitigating circumstances recited in the instruction. The jury, however, was instructed only as to statutory mitigating circumstances and the sentencing judge did not consider such circumstances in reaching his sentencing decision, thereby entitling petitioner to relief under Hitchcock and its progeny. The "mere presentation" doctrine relief relied upon by the Eleventh Circuit has been specifically rejected by the Florida

3. In November, 1984, pursuant to §922.07, Fla. Stat. (1983), Mr. Alvord was found incompetent to be executed by three psychiatrists appointed by the Governor. A mental examination to be conducted on September 29, 1987, was ordered by the Governor to determine if Mr. Alvord's incompetency to be executed status had changed.

4. Thereafter, on September 25, 1987, defendant filed his Petition for Extraordinary relief, for A Writ of Habeas Corpus and Request for Stay of Mental Examination before the Florida Supreme Court, seeking a stay of the compelled mental examination ordered by the Governor. This petition alleged that a mental examination should not be conducted in light of Mr. Alvord's possible

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Supreme Court. See Riley, Morgan, Thompson and Downs, supra.

resentencing under Hitchcock. On September 28, 1987, this Petition was denied without opinion. On October 10, 1987, a Motion for Rehearing and Motion for Clarification was filed seeking clarification with respect to the Hitchcock claim.

On January 26, 1988, the court directed the State to respond to the issue raised, which the State did. On July 8, 1988, defendant filed an Amendment to Petition for Writ of Habeas Corpus and Request for Oral Argument, which raised a separate claim under Caso v. State, 524 So.2d 422 (Fla. 1988).[2]

Upon oral argument, the Florida Supreme Court denied relief, finding the Hitchcock error to be harmless. Alvord v.

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[2] The Caso claim is not raised in this Petition, the Florida Supreme Court having previously resolved this issue on its merits.

State, 538 So.2d 838 (Fla. 1989), on rehearing, 541 So.2d 598 (Fla. 1989). Significantly, however, it did so only with respect to non-statutory mitigating factors developed on the face of the record. The Court did not address the restriction of non-statutory mitigating circumstances not present on the face of the record. In fact, there exist and existed significant non-record mitigating circumstances which could have been but were not presented to the jury, due to the statutory restriction on the presentation of evidence relevant to such circumstances. Under the reasoning of Hall v. State, 541 So.2d 1125, 1128 (Fla. 1989), the defendant must be afforded the opportunity, by way of an evidentiary hearing, to represent these non-record mitigating circumstances to further substantiate his Hitchcock claim.

5. There is no procedural bar to the raising of the instant claim because the issue presented raises a question of law which has undergone a substantial change since the filing of defendant's original petition. This issue is whether the defendant was permitted to introduce and argue, for the jury's consideration, non-statutory mitigating evidence in capital sentencing proceedings. An evidentiary hearing is required so that this Court may hear evidence with respect to the existence of non-record mitigating circumstances which were present but not argued to the jury at the defendant's sentencing hearing due to the sentencing scheme in effect at that time.

Mr. Alvord's Hitchcock claim is based upon a significant change in the law. Cooper v. Dugger, 526 So.2d 900 (Fla. 1988) (Lockett/Hitchcock claims subject to

no procedural bar because Hitchcock represents a substantial change in law); Morgan v. State, 515 So.2d 975 (Fla. 197); McCrae v. State, 515 So.2d 874 (Fla. 1987); Thompson v. Dugger, 515 So.2d 173 (Fla. 1987) (Hitchcock is a "change in law" cognizable in post-conviction proceedings); see Downs v. Dugger, 514 So.2d 1069 (Fla. 1987) ("We now find that a substantial change in law has occurred that requires us to reconsider [a Hitchcock issue]"; merits relief granted); Zeigler v. Dugger, 524 So.2d 419 (Fla. 1988).

Hitchcock v. Dugger did not exist when Mr. Alvord presented his case to this Court in his prior 3.850 petition. Because Hitchcock constitutes a "substantial change" in the law, an evidentiary hearing on this issue and relief is warranted. Downs, supra. See,

also, Cooper v. Wainwright, 807 F.2d 881, 889 (11th Cir. 1986) (evidentiary hearings generally required in cases raising Lockett v. Ohio claims); Lemon v. State, 498 So.2d 923 (Fla. 1986) (evidentiary hearing warranted when the "files and records" do not "conclusively show that the defendant" is entitled to no relief."); O'Callaghan v. State, 461 So.2d 1354, 1355 (Fla. 1984) (same); State v. Sireci, supra, 502 So.2d at 1224 (same standard; successive post-conviction action). The "files and records" by no means show that Mr. Alvord is entitled to "no relief" on this claim.

Mr. Alvord was tried in 1974, before Lockett and Songer, at a time when Florida judges and lawyers labored under the view that the introduction of evidence in mitigation of a capital sentence was restricted to a narrow statutory list.

See Songer v. Wainwright, 769 F.2d 148, 1494 (11th Cir. 1985) (en banc) (Hall, Kravitch, Johnson and Anderson, JJ., concurring) ("Of course, neither the State trial judge's nor Singer's counsel's [preclusive] construction of the state was unfounded. Quite the contrary, theirs was the most reasonable interpretation of Florida law at the time.") See also Harvard v. State, 486 So.2d 537 (Fla. 1986); Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987); Hargrave v. Dugger, 832 So.2d 1529 (11th Cir. 1987) (en banc). Mr. Alvord's trial counsel operated under that "reasonable" but unconstitutionally restrictive interpretation, believing that nonstatutory mitigating circumstances were not admissible at the sentencing hearing. As a consequence, Mr. Alvord was denied an individualized and reliable capital sentencing determination through the

operation of state law. The fact that this is not Mr. Alvord's first Rule 3.850 action does not obviate the need for a proper evidentiary hearing -- even in second or third post-conviction actions an evidentiary hearing is proper when the files and records do not conclusively show that movant is entitled to "no relief" on properly brought claims. Sireci, supra, 502 So.2d at 1224; Crew, supra, 477 So.2d at 985 (evidentiary hearing and stay proper on basis of allegations in defendant's successive Rule 3.850 action because "the files and records ... [did] not conclusive show that the defendant [was] entitled to no relief ...").

6. Under the reasoning of Adams v. State, ___ So.2d ___, 14 FLW 235, 237, f.n. 3 (Fla. May 12, 1989), Mr. Alvord's petition is timely filed. ("We have delayed the application of this

interpretation of the rule until July 1, 1989, in order not to penalize other defendant who might be in the same position as Adams.")

7. The jury was instructed in this case as follows:

> The mitigating circumstances which you may consider if established by the evidence are these:
>
> A, the defendant has no significant history of prior criminal activity.
>
> B, the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> C, the victim was a participant in the defendant's conduct or consented to the act.

D, the capital felony was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.

E, the defendant was an accomplice in the capital felony committed by another and his participation was relatively minor.

F, the defendant acted under duress or under the domination of another person.

G, at the time of the capital felony the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or

H, the youth of the defendant at the time of the crime.

[Tr. 1229-1230]. Such instruction establishes that the jury was not free to consider non-statutory circumstances, in violation of the Hitchcock doctrine.

STATEMENT OF FACTS AND NATURE OF RELIEF SOUGHT

8. Throughout his life Gary Eldon Alvord has been the victim of one of the most extreme forms of psychiatric disorders known to the medical profession. He was first institutionalized when he was thirteen years old. He remained in such institutions in Michigan until early 1973, when he escaped and came to Florida. He was under an adjudication of insanity and incompetency at the time of the crimes for which he had been condemned to die.

9. At the time of Mr. Alvord's trial, Florida law precluded jurors from considering non-statutory mitigating circumstances. For this reason, counsel for Mr. Alvord did not investigate or develop a substantial number of non-statutory mitigating circumstances present in Mr. Alvord's life. For instance, the jury heard no evidence of Mr. Alvord's traumatic life as a child and later, as a teenager. Indeed, Mr. Alvord spent virtually all of his teenage years involuntarily committed to mental institutions. But the jury was only the defendant's mental condition at the time of the cirme. Mr. Alvord's mental history could not be and thus, this evidence was not presented

The mitigating circumstance of Mr. Alvord's mental history was compelling, but it did not "fit" within the stringent

category of mental condition at the time of the crime. These non-mitigating circumstances were critical, yet under the jury instructions given the jury was not free to consider them. More importantly, Mr. Alvord's counsel did not feel free to develop them. Thus, the trial court erroneously limited consideration of psychological facts to the statutory mental mitigation, thereby severely restricting the jury's consideration of it. Messer v. Florida, 834 F.2d 890, 893-895 (11th Cir. 1987).

10. There also existed substantial evidence of Mr. Alvord's capacity for rehabilitation - another factor which could not be considered by the jury in reaching is recommendation. Although the jury was advised of this fact, as well as the fact that Mr. Alvord was married and the father of a young child, during jury

instructions it specifically was told that it could only consider the statutory mitigating factor set forth in the statute. Following the jury instructions given, it was compelled to disregard these facts.

11. In addition, there existed substantial evidence, not apparent from the face of the record, which could have been considered by the jury in reaching its recommendation. Counsel for Mr. Alvord respectfully requests this Court to conduct an evidentiary hearing so that he may present evidence, which was in existence at the time of his sentencing hearing, with respect to the following non-statutory mitigating factors: 1) drug and alcohol abuse and intoxication throughout his life and on the day of the crime; 2) family history and background to establish the systematic and continuous

deprivation of comfort, care and love when he was child; 3) his entire mental history[3] and; 4) his capacity for rehabilitation. None of this information was considered by the jury. Indeed, most of it was not heard by the jury due to the preclusion of presenting such evidence by §921.141, Fla .Stat. (1987).

12. The unconstitutional preclusion of the jury's consideration of such factors reaches to the heart of the fairness and accuracy of the sentencing determination. The proper sentence should be determined by a jury and a judge upon full consideration of all relevant mitigating factors "rather than by this Court on the face of a cold record."

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[3] Although Dr. Robey presented fragments of Mr. Alvord's mental history, his testimony was far from complete and omitted crucial facts concerning Mr. Alvord's life in Michigan's mental hospitals.

Harvard v. State, 486 So.2d 539. The Florida Supreme Court has never hesitated to reverse for resentencing where the mitigating instructions were erroneous,[4] for under Florida law "[i]t is the jury's task to weigh the aggravating and mitigating evidence." Valle v. State, 502 So.2d 1225, 1226 (Fla. 1987).

The sentencing proceedings in Mr. Alvord's case are substantially identical to those faced in Hitchcock where "it could not be clearer that the advisory

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[4] Floyd v. State, 497 So.2d 1211 (Fla 1986) (Failure to instruct on mitigation denied "the right to an advisory opinion from a jury" even though this Court affirmed the trial judge's rejection of mitigation); Toole v. State, 479 So.2d 731 (Fla. 1985) (failure to instruct on section (6)(b) mitigating); Robinson v. State, 487 So.2d 1040 (Fla. 1986) (failure to instruct on two of the statutory mitigating factors because while the judge "may not have believed it, ... others might have"). See also Patten v. State, 467 So.2d 975 (Fla. 1985) (Allen charge); Rose v. State, 425 So.2d 521 (Fla. 1983) (same).

jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances." 481 U.S. at 398. The sentencing also is the same in all material respects as that faced by the Florida Supreme Court in Lucas v. State, 490 So.2d 943 (Fla. 1986), where the record revealed that all parties understood and adhered to the statutory restriction on mitigating circumstances at the original pre-Songer sentencing trial. In Lucas "a scant twelve pages" was devoted to sentencing. Id. at 946. The record in Mr. Alvord's case just as complete as Lucas' was abbreviated and restricted to statutory mitigation.

13. Resentencing before a new jury is the constitutional mandate, for the pre-Songer sentencing is fatally flawed. The defendant respectfully requests this

Court to conduct an evidentiary hearing by which to enable the defendant to prove such available nonstatutory mitigating factors and, upon its conclusion, to order a new sentencing hearing in this cause.

WHEREFORE, the defendant respectfully requests this Court to grant him an evidentiary hearing in this cause, and upon its conclusion, to vacate his sentences of death and order him resentenced in accordance with the Hitchcock mandate.

Respectfully submitted,

SHEPPARD AND WHITE, P.A.

By /s/ Wm. J. Sheppard

Wm. J. Sheppard, Esq.
Fla. Bar No. 109154
215 Washington Street
Jacksonville, Fl. 32202
(904) 356-9661
ATTORNEYS FOR DEFENDANT

VERIFICATION

STATE OF FLORIDA :
: SS.
COUNTY OF BRADFORD :

Before me, the undersigned authority, this day personally appeared Gary Eldon Alvord, and says that he is the defendant in the above-styled cause, that he has read the foregoing, and that he has personal knowledge of the facts and matters therein set forth and alleged; and that each and all of these facts and matters are true and correct.

/s/ Gary Eldon Alvord
GARY ELDON ALVORD

Sworn to and subscribed before me this _____ day of June, 1989.

NOTARY PUBLIC, State of Florida at Large.

My Commission expires:

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Peggy Ann Quince, Esquire, Assistant Attorney General, 1313 Tampa Street, Ste. 804, Park Trammel Building, Tampa, Florida 33624, by mail, this 30th day of June, 1989.

/s/ Wm. J. Sheppard
ATTORNEY

IN THE CIRCUIT COURT OF THE
THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH
COUNTY, FLORIDA, CRIMINAL
DIVISION

CASE NO: 73-1398
DIVISION: C

STATE OF FLORIDA

vs.

GARY ELDON ALVORD, a/k/a
PAUL ROBERT BROCK, a/k/a
GARY ELDON VENCZEL

AMENDMENT TO SECOND MOTION
FOR POST-CONVICTION RELIEF

Comes now the defendant, Gary Eldon Alvord, by and through undersigned counsel, pursuant to Fla. R. Crim P. 3.850 and the order of the Florida Supreme Court in Spalding v Dugger, _ So.2d ___, Case No. 74,355 (June 30, 1989) and hereby amends his previously filed Second Motion for Post-Conviction to include the following allegations within the Statement of Facts:

1. Gary Alvord suffers from a genetic mental disorder, in the form of schizophrenia, which has plagued his family for three generations His mother, Gertrude Alvord, suffered from nervous breakdowns throughout her life, requiring repeated hospitalizations and continuous medication. His son Gary, Jr., likewise suffers from this disorder and manifests many of the same symptoms as his father.[1]

2. As the result of her mental illness, Gertrude Alvord was unable to care for her son and indeed, rejected him at birth. She told one of Gary's treating physicians that she was "displeased" when she learned at 24 years old that she was pregnant because it was "too soon", even though she already had another child.

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[1] See the affidavit of Helen B. (Lee) Norton attached hereto as Exhibit "A" and incorporated by this reference.

According to information received[2], Mrs. Alvord suffered from a total breakdown shortly after her son's birth and had to be hospitalized.[3] Thus, as a young infant he was completely cut off from any maternal nurturing and was effectively abandoned by his mother. Gertrude's mental illness prevented her from being a parent to her son. He was often neglected. All of his early childhood pictures depict Gary in old coveralls or other used clothing (sometimes female) and in a state of disorder. When Gary was 12 years old, one of his treating physicians noted, "In the interview Mrs. Alvord appeared to be very

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[2] Gertrude Alvord is now deceased. Pursuant to §15.231 and §333.1823, Michigan Statutes, counsel for Mr. Alvord is now seeking to obtain Mrs. Alvord's psychiatric records to further illustrate the facts alleged in this petition.

[3] She was rehospitalized when Gary was 11 years old.

confused and frequently was irrational. Mrs. Alvord a former mental patient is currently on convalescent status. Because of her apparent rather poor remission, it is not felt that she is capable of becoming involved in planning for Gary." Lacking maternal love, Gary sucked his thumb until he was 11 years old. He received no parental supervision. Still, as a child he was "quiet, docile and very kind to pets. He loved dogs and cats especially."[4] He was also a good elementary school student.

3. Mr. Alvord also suffered from severe rejection by his father, who blamed Gary for his wife's illness. Although he had the funds to do so, Mr. Alvord did not buy his son adequate clothing, so that

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[4] These notations are contained in medical records which were <u>not</u> presented to the sentencing judge and jury.

Gary was forced to wear second-hand clothes. His father was extremely cold and even hostile to Gary, a fact noted by physicians when Gary was only 11 years old. Early psychiatric records of Gary Alvord refer to "...his previous severe experiences of rejection by his parents and parent figures." when Gary was 12 years old, Dr. S. Bloomberg noted that upon questioning Gary about, "...his severe rejection by his parents, the patient completely broke. His facade of bravado and grandiosity collapsed so that he began to weep in an uncontrollable fashion." His admission reports often refer to him as "rather thin", ill-kept and "not too neatly dressed or groomed."

4. Although neither of his parents attended church or took their son to church, Gary sought out and attended a Baptist Church, without his parents

assistance. The only religious views he learned were self-taught.

5. Before he was 11 years old, Mr. Alvord's parents placed him in foster homes and group homes, where he suffered repeated abuse. Homosexuality and involuntary homosexual activity were rampant at Northville Hospital, where Gary was placed when he was 12 years old. During the summer, temperatures inside Northville often exceeded 100 degrees, with no ventilation. once institutionalized, Gary was rarely visited by his parents, nor did they inquire about his well-being, except to indicate that they could provide no financial support for him.

6. Other family members likewise rejected Gary; when he was 8 years old his maternal grandmother forever barred him from her home because he did not stay in

the yard on one occasion when told to do so. During his critical adolescent years he was essentially abandoned by his entire family.

7. Despite her rejection of Gary, he remained a loyal and devoted son to his mother throughout her life, frequently sending her postcards and paintings he had made.

8. During the time in which the crimes for which he was convicted, Mr. Alvord was under the extreme influence of drugs and alcohol, to the extent that he was frequently irrational and disoriented as to time and place.

9. During his incarceration at the Hillsborough County Jail, Mr. Alvord was, for months at a time, stripped naked in a solitary cell, without sheets or linens, and in extreme conditions of confinement. Nonetheless, he never presented any

behavior problems while incarcerated there.

10. At trial, Mr. Alvord waived his defense of insanity, even though this defense could have resulted in his acquittal on all counts.

11. Mr. Alvord is, and throughout his life has been, an extremely talented artist. Lacking funds he has often made his own materials. His artwork is reflective of another side of his personality which was not presented to the jury - that of a sensitive individual.

12. At present, there exist additional mitigating non-statutory circumstances which should be considered by this Court in determining the merits of this petition, namely that: a. Mr. Alvord continues to suffer from mental illness to such a degree that he has been found to be incompetent to be executed pursuant to

§922.07, Fla. Stat. (1987); b. his parents are both now deceased and he is without any family; and c. his good behavior while incarcerated for these crimes.

Respectfully submitted,

SHEPPARD AND WHITE, P.A.

By: /s/ Wm. J. Sheppard
Wm. J. Sheppard, Esq.
Florida Bar No: 109154
215 Washington Street
Jacksonville, FL 32202
(904) 356-9661
ATTORNEYS FOR DEFENDANT

VERIFICATION

STATE OF FLORIDA :
: SS.
COUNTY OF BRADFORD :

Before me, the undersigned authority, this day personally appeared Gary Eldon Alvord, and says that he is the defendant in the above-styled cause, that he has read the foregoing, and that

he has personal knowledge of the facts and matters therein set forth and alleged; and that each and all of these facts and matters are true and correct.

/s/ Gary Eldon Alvord
GARY ELDON ALVORD

Sworn to and subscribed before me this 1st day of August, 1989.

Notary Public
State of Florida at Large
My Commission Expires: 8-10-91

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Peggy Ann Quince, Esquire, Assistant Attorney General, 1313 Tampa Street, Suite 804, Park Trammel Building, Tampa, Florida 33624, by mail, this 1st day of August, 1989.

/s/ Wm. J. Sheppard
ATTORNEY

IN THE CIRCUIT COURT OF THE
THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH
COUNTY, FLORIDA, CRIMINAL
DIVISION

CASE NO: 73-1398
DIVISION: C

STATE OF FLORIDA

vs .

GARY ELDON ALVORD, a/k/a
PAUL ROBERT BROCK, a/k/a
GARY ELDON VENCZEL

AFFIDAVIT

COUNTY OF DUVAL :
ss:
STATE OF FLORIDA :

BEFORE ME, the undersigned authority, personally appeared Helen B. (Lee) Norton, who after being duly sworn, affirms and deposes that she is a private investigator licensed through the State of Florida. On July 17, 1989, I interviewed Brenda Brock, formerly known as Brenda Alvord, with respect to her knowledge of Gary Eldon

Alvord and his childhood. Ms. Brock relayed the following information to me:

1. Brenda Brock met Gary Eldon Alvord in 1966, when she was 15 years old, through mutual friends in their neighborhood. Gary and Brenda knew each other for about a year when they got married.

2. Gary was very good to Brenda when they were together. He was never physically or mentally abusive. They were very close and very much in love.

3. Gary worked most of the time they were together, and always brought his paycheck home to use for living expenses. He never went out drinking at bars, like some men did.

4. They had pets and Gary was very good with them. He always fed them and walked them and made sure they were clean

and healthy. He seemed to really enjoy them.

5. She knew both Gary's parents - Gertrude (Gertie) and Eldon (Al). She lived with them for about six months when Gary was in Ionia State Hospital. The best way to describe Gary's family was very cold. There was never any warmth between any of them. She never saw them hug or touch each other, or say they loved one another. It was a sterile environment, which hurt Gary very much. It was as if Gary was in the way - one didn't get the impression that he was loved or wanted.

6. She recalled one incident in particular which is a good example of how Gary's family was. Gary and Brenda were dating; they were talking about getting married. One night, during a time when Brenda was having some problems at home, she went to Gary's house to spend time

with him. When it started getting late, Gary asked his dad if Brenda could spend the night on the couch. His father wouldn't hear of it, and refused immediately. Gary got upset and asked his father why she couldn't stay. Gary seemed to take it as a real rejection of himself; he started crying and said, "Dad, I love you, I love you." Al was stone cold. He appeared to be totally disgusted with Gary. All he said was "Get the hell out of here." It was awful. Gary was so hurt. He wanted love and affection from his parents so badly, but, from what Brenda saw, mostly what he got was rejection.

7. She didn't know Gary when he was a child, but she recalled conversations in which he talked about his childhood. One of his most vivid memories was of how his parents would only buy him clothes from

Goodwill and second-hand shops. According to Brenda, Gary is a sensitive person, so this was very embarrassing because he would have to wear second-hand, worn-out coveralls to school everyday and would be made fun of by the other children. From what Brenda saw, and understood from conversations over the years, it wasn't really necessary that Gary go without; his parents had enough money to buy him decent clothes but they just wouldn't spend it on him. Brenda recalled that this hurt Gary a lot, and made him feel rejected and unimportant.

8. Gary told Brenda of another incident which seems to show how big an issue money was in the Alvord home and how Gary responded to it. He said that when he was 4 or 5 he found a jar of money in the house and ran outside and threw it up in the air "for everyone to have." When he

talked about his childhood, it sounded as if his parents were so preoccupied with making and saving money that they didn't have time for Gary. What's more, they never spent the money on Gary, or on family things. Brenda could not recall Gary ever talking about family trips, or going to the movies or bowling. They just didn't seem like a family.

9. According to Brenda, the relationship between Gary's parents was really odd. Gertie absolutely idolized Al. Her world revolved around him. She was always fussing over him, bringing him food and drinks, asking if he needed anything, if everything was okay. Al, on the other hand, treated her horribly. He completely ignored her. He hardly said a word to her or was appreciative of what she did for him. Brenda said it was like Gary didn't have parents at all. It was more like his

father was the person who provided the bare necessities, and his mother was another sibling, a child herself.

10. Gertie was mentally ill most of her life. According to Brenda, Gary's father always blamed him for Gertie's breakdowns, but Brenda was told that his mother had a breakdown right after Gary was born. Brenda recalled that Gertie was hospitalized then. The other times she broke down she had to be tied down and taken to the hospital in an ambulance.

11. During the months Brenda lived with Gertie and Al, and over the years she knew them, Gertie never acted normal. According to Brenda, one thing you couldn't miss was her voice. It was always high pitched and strained. She was always nervous. She paced the floor constantly. Another thing which was odd was that she wouldn't leave the house. Brenda's most

frequent memory is of Al going off to the horse races and Gertie staying home to "watch the house." She felt she had to stay there so that no one would rob them. But they didn't have anything to steal because they wouldn't part with a penny. According to Brenda, Gertie was definitely not in touch with reality. When she spoke, she would change the subject right in the middle of a sentence. She couldn't finish a thought or an idea. The doctor kept her on medicine called Thorazine, which was supposed to keep her from having nervous breakdowns. Brenda thought it helped some, but she was still very mentally ill. That's why Gertie could never be a real mother to Gary. Brenda said she seemed more like a family friend, nice but distant.

12. During the time Brenda stayed with Gertie and Al, they only went to see

Gary at Ionia a few times. That made it hard for Brenda because she didn't have a car or any money. Once when she went with Al he made advances toward her. He put his hand in her blouse. Brenda was only about 16 or 17, at that time, and he was 60. She told him he had better keep his hands to himself, and tried to stay away from him after that. The thought of it still sickens her today.

13. Brenda always suspected that Gertie and Al didn't have much of a sexual life because Gertie once told Brenda that they had a rule of always sleeping with the bedroom door open. Gertie told Brenda that there wasn't any need to keep it closed anyway, except for 3 minutes a month. After what Al did to Brenda, she said she wondered what he was doing all those nights when he said he was at the horse races.

14. Brenda believes that Gary's mental illness is hereditary. It came from his Mom's side of the family. Brenda had hoped it would not affect their son, Gary Jr., but it has. He is mentally ill, too. The doctor said he is psychotic. He said Gary should be in a mental institution, but Brenda is afraid to put him in a place like Gary, Sr., was in because she remembers how badly the patients are treated there. She doesn't have money for private hospitals, which would probably be better than Northville, so she is trying to take care of him at home.

15. Watching little Gary grow up has been terribly frightening for Brenda because she has seen him gradually get worse and worse, just like Gertie and Gary. At first Brenda didn't want to believe it was happening; she thought that since Gary hadn't ever been around his

father that he couldn't become like him. But her three other children, by her second marriage, are fine, not like Gary at all. She believes that what is wrong with him is genetically inherited, and that he can't help it. She indicated that she is doing everything she can to make sure he isn't put into a sterile environment with people who don't understand him or care for him, like Gary was. She believes he is sick, just like his father, and that he needs help.

16. She would have told what she knows at the time of Gary's trial, but his lawyer didn't ask her and she didn't know it was important. She is willing to provide additional information concerning Gary if requested.

FURTHER AFFIANT SAYETH NAUGHT

/s/ Helen B. (Lee) Norton
Helen B. (Lee) Norton

Sworn to and subscribed
before me this 31st day of
July, 1989.

Notary Public
State of Florida at Large

My Commission Expires:

IN THE CIRCUIT COURT OF THE
THIRTEENTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR
HILLSBOROUGH COUNTY CRIMINAL DIVISION

STATE OF FLORIDA

vs CASE NO. 73-1398

GARY ELDON ALVORD DIVISION "C"

_____/

ORDER GRANTING EVIDENTIARY HEARING ON SECOND MOTION FOR POST CONVICTION RELIEF

THIS CAUSE having come before the Court upon the Defendant's Second Motion for Post Conviction Relief filed on or about June 30, 1989, and Amendment to Second Motion for Post Conviction Relief and the State having filed a Response to Defendant's Second Motion for Post Conviction Relief, Motion for Summary Judgment and Memorandum of Law in Support Thereof and the Defendant having filed a Memorandum in Support of Defendant's Second Motion for Post Conviction Relief

on May 11, 1992, and this Court, having reviewed those pleadings, the files and records in the case and all case authority cited by the Defendant and the State, finds that the Defendant is entitled to an evidentiary hearing in which he may present evidence of non-statutory mitigating evidence that could have been presented at sentencing, but was not due to Hitchcock error, and further the Court will consider argument of counsel on the standard to be utilized, i.e. (a) whether the error was harmless beyond a reasonable doubt, (Meeks v. Dugger, 576 So.2d 713, 716 (Fla. 1991), and Hall v. State 541 So.2d 1125, 1128 (Fla. 1989)) or (b) whether a totality of the evidence establishes the existence of substantial nonstatutory mitigating evidence not previously introduced, (Meeks v. Dugger, 576 So.2d 713, 719, concurring opinion),

or (c) whether the Hitchcock error would likely affect the outcome of the proceeding (Hall v. State, supra, dissent at p. 1129, utilizing the test established in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 8 L.Ed.2d 674 (1984). It is therefore

ORDERED AND ADJUDGED that this matter is scheduled for a status review on Friday, November 13, 1992, at 8:30 a.m. or as soon thereafter as counsel may be heard for the purpose of scheduling an evidentiary hearing.

DONE AND ORDERED in Chambers at Tampa, Hillsborough County, Florida, this 2nd day of November, 1992.

/s/ Diana M. Allen
DIANA M. ALLEN
CIRCUIT JUDGE

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Wm. J. Sheppard, Esquire

IN THE CIRCUIT COURT OF THE
THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY,
FLORIDA, CRIMINAL DIVISION

CASE NO: 73-1398

DIVISION: C

STATE OF FLORIDA

vs.

GARY ELDON ALVORD, a/k/a
PAUL ROBERT BROCK, a/k/a
GARY ELDON VENCZEL
_____/

SECOND AMENDMENT TO SECOND MOTION
FOR POST-CONVICTION RELIEF

Comes now the defendant, Gary Eldon Alvord, by and through undersigned counsel, pursuant to Fla. R. Crim. P 3.850, and hereby amends his previously filed Second Motion for PostConviction Relief to include the following claim:

ADDITIONAL CLAIM

MR. ALVORD'S JURY WEIGHED INVALID AND UNCONSTITUTIONALLY VAGUE AGGRAVATING CIRCUMSTANCES, IN VIOLATION OF HIS RIGHT TO AN INDIVIDUALIZED AND RELIABLE

SENTENCING PROCEEDING, AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 9, 16, and 17 OF THE FLORIDA CONSTITUTION.

This claim is evidenced by the following facts:

1. All other allegations and factual materials contained in Mr. Alvord's pending motion for post-conviction relief, as amended, are incorporated herein by specific reference.[1]

2. Mr. Alvord's death sentence resulted from multiple errors in the instructions to his jury concerning the proper eighth amendment weighing of aggravating and mitigating circumstances. That there was fundamental constitutional error in the instructions to the jury is a

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[1] References to Mr. Alvord's original record-on-direct appeal will be designated as "R" followed by the corresponding page in the record, e.g., "R 1204."

matter which is now not open to debate. Espinosa v. Florida, 112 S. Ct. 2926, 120 L.Ed.2d 854 (1992). Nor is there any question that in an appropriate case, those errors require that a new sentencing proceeding be conducted. James v. State, 18 F.L.W. S139 (Fla., March 4, 1993). In James, the Florida Supreme Court held that Espinosa must be retroactively applied to cases where the Espinosa error was preserved at trial and raised on direct appeal. Id. This is such a case.

A. "INVALID" AGGRAVATING CIRCUMSTANCES WERE PRESENTED TO MR. ALVORD'S JURY.

3. In Sochor v. Florida, 112 S. Ct. 2114, 119 L.Ed.2d 326 (1992), the Supreme Court made clear that the eighth amendment is violated whenever the sentencer in a "weighing" state, like Florida, considers an "invalid" aggravating circumstance. An aggravating circumstance may be invalid

either because it does not apply as a matter of law, 119 L.Ed.2d at 341, or because it is so undefined that it fails to offer adequate guidance to the sentencer. Both errors occurred at Mr. Alvord's trial. As the Court noted in Sochor, either type of error tilts the weighing process in favor of death:

> In a weighing State like Florida, there is Eighth Amendment error when the sentencer weighs an "invalid" aggravating circumstance in reaching the ultimate decision to impose a sentence. See Clemons v. Mississippi, 494 U.S. 738, 752 (1990). Employing an invalid aggravating factor in the weighing process "creates the possibility ... of randomness," Stringer v. Black, 503 U.S. _, _ (1992) (slip op. at 12), by placing a "thumb [on] death's side of the scale," Id., thus "creat[ing] the risk of treat[ing] the defendant as more deserving of the death penalty." Id. Even when other valid aggravating factors exist as well, merely affirming a death sentence reached by weighing an invalid aggravating factor deprives a defendant of "the

> individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances." Clemons, 494 U.S. at 752 (citing Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982)); see Parker v. Dugger, 498 U.S. ___, ___ (1991) (slip op. at 11).

Sochor, 119 L.Ed.2d at 336-37.

4. In the instant case, the trial court instructed the jury to consider two aggravating factors that are unconstitutionally vague and that encouraged the jury to recommend a sentence of death for improper reasons. In addition, the jury was instructed improperly that they could "double" two aggravating factors that derive from precisely the same set of operative facts. These errors require that Mr. Alvord's death sentences be invalidated. Stringer v. Black, 112 S. Ct. 1130 (1992). Specifically, the jury was instructed:

> The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence:
>
> . . .
>
> C, that at the time the capital felony was committed the defendant also committed another capital felony.
>
> D, that the defendant knowingly created a great risk of death to many persons.
>
> . . .
>
> H, that the capital felony was especially heinous, atrocious or cruel manifesting exceptional depravity.

R 1227-28.

5. The trial court specifically found all three of the above factors to be present, in addition to a fourth factor (committed during the course of a burglary). R 97-98.

6. The Florida Supreme Court upheld the trial court's findings of all four aggravating factors, including the

"especially heinous," "great risk of death to many," and "also committed another capital felony" aggravating factors. Alvord v. State, 322 So. 2d 533, 540 (Fla. 1975). Espinosa makes clear, however, that the analysis does not end with the trial court findings concerning aggravating circumstances, but must extend to the jury's weighing process also:

> Our examination of Florida case law indicates, however, that a Florida trial court is required to pay deference to a jury's sentencing recommendation, in that the trial court must give "great weight" to the jury's recommendation, whether that recommendation be life, see Tedder v. State, 322 So.2d 908, 910 (Flat 1975), or death, see Smith v. State, 515 So.2d 182, 185 (Flat 1987), cert. denied, 485 U.S. 971 (1988); Grossman v. State, 525 So.2d 833, 839, n. 1 (Flat 1988), cert. denied, 489 U.S. 1071-1072 (1989). Thus, Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of

> that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances.
>
> It is true that, in this case, the trial court did not directly weigh any invalid aggravating circumstances. But, we must presume that the jury did so, see Mills v. Maryland, 486 U.S. 367, 376-377 (1988), just as we must further presume that the trial court followed Florida law, cf. Walton v. Arizona, 497 U.S. 639, 653 (1990), and gave "great weight" to the resultant recommendation. By giving "great weight" to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found. This kind of indirect weighing of an invalid aggravating factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor, cf. Baldwin v. Alabama, 472 U.S. 372, 382 (1985), and the result, therefore was error.

Espinosa, 112 S. Ct. at 2928 (emphasis added).

"Heinous, atrocious, or cruel" aggravating circumstance

7. Espinosa specifically holds that Florida's standard jury instructions on the "especially heinous, atrocious or cruel" aggravating factor violate the eighth amendment. As the Court noted in Espinosa, the weighing of an aggravating circumstance violates the eighth amendment if the description of the circumstance "is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." Espinosa, 112 S. Ct. at 2928. The Court further noted that it previously held "instructions more specific and elaborate" than Florida's "heinous, atrocious, or cruel" instruction to be unconstitutionally vague. Id.

8. After concluding that, in every sense meaningful under the eighth amendment, the Florida jury indeed sentences, the Supreme Court had no

difficulty in concluding that the provision of the Florida "heinous, atrocious, or cruel" instruction violated the eighth amendment. The error in Espinosa was not cured by any trial court "independent" weighing of aggravation and mitigation, even though in Espinosa, unlike the instant case, the trial court did not improperly weigh the "especially heinous "aggravator:

> It is true that, in this case, the trial court did not directly weigh any invalid aggravating circumstances. But, we must presume that the jury did so, see Mills v. Maryland, 486 U.S 367, 376-77 (1988), just as we must further presume that the trial court followed Florida law, cf. Walton v. Arizona, 497 U.S. 639, 653 (1990), and gave "great weight" to the resultant recommendation. By giving "great weight" to the jury recommendation. the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found. This kind of indirect weighing of an invalid aggravating factor creates the same potential for

> arbitrariness as the direct weighing of an invalid aggravating factor, cf. Baldwin v. Alabama, 472 U.S. 372, 382 (1985), and the result. therefore. was error.

Espinosa, 112 S. Ct. at 2928 (emphasis added).

9. Espinosa makes it undeniable, therefore, that where a Florida jury recommends death after receiving either the standard jury instruction or any similar instruction that suffers from the defects identified by the Supreme Court, the verdict is infected with eighth amendment error for precisely the same reasons as in Shell v. Mississippi, 498 U.S. (1990); Maynard v. Cartwright, 486 U.S. 356 (1988); and Godfrey v. Georgia, 446 U.S. 420 (1980). In such cases, the death sentence is tainted because the jury presumably weighed an invalid aggravating factor, thus placing a thumb on "death's

side of the scale." Stringer v. Black, 112 S. Ct. 1130, 1137 (1992).

10. The "especially heinous" instruction actually given by the court at Mr. Alvord's trial, over the defendant's pretrial objection, suffered from the same defects as the standard jury instruction recently held to be invalid, and virtually ensured that the jury would find and weigh the factor, despite the fact that such a finding would violate both Florida law and the United States Constitution.

11. This instruction suffers from the very same defects that are fatal under Espinosa and the United States Supreme Court's other cases regarding the definition of aggravating factors. The instruction allows the jury to find and weigh the aggravating factor if they determine that the crime was either "heinous" or "atrocious" or "cruel," and

then provides definitions of those terms that themselves provide no guidance to the jury, but merely "pejorative adjectives" that "describe the crime as a whole." See Arave v. Creech, 113 S. Ct. 1534, 1541 (1993). As a result, even assuming arguendo that the definition of "cruel" or the "designed to inflict a high degree of pain" language was adequate, the definitions of "heinous" ("extremely wicked or shckingly evil," R 1228), and "atrocious" ("outrageously wicked and vile," id.), permitted the lay jury to apply the aggravating factor to virtually any first degree murder. This is precisely the same defect that the Supreme Court found in the Mississippi jury instruction struck down in Shell v. Mississippi, 498 U.S. 1 (1990). See id. (Marshall, J., concurring).

12. In Espinosa, the Court held that where an improper instruction is given, it may be presumed that the jury weighed the invalid aggravating factor. Espinosa, 112 S. Ct. at 2928. In the instant case, in addition to this presumption, we can be virtually certain that the jury weighed the factor improperly. In closing argument, the prosecutor seized on the facts preceding the homicide in arguing vehemently that the aggravating factor applied and that Mr. Alvord should be put to death. The trial court found the factor applicable.

13. During closing argument, the prosecutor exacerbated the harm to Mr. Alvord of instructions that encourage the jury to vote for death on the basis of vague, undefined factors. In contravention of the purpose of the statute, which is to guide the jury's discretion away from

arbitrary and capricious decision making, the prosecutor invoked his own expertise and urged the jury to find this crime "especially heinous" based on his experience as a prosecutor:

> Ladies and gentlemen, I can think of no crime that I have ever heard in Hillsborough County or anywhere else, for that matter, that is any more atrocious, any more cruel, any more brutal than this crime.

R 1205-06.

14. Almost any juror, hearing this passionate plea or considering the facts recited by the prosecutor, in light of the instruction given by the court, would find that the murder was "especially heinous." Moreover, we can be virtually certain that the jury did in fact weigh the aggravator, because the trial judge who gave the instruction himself weighed it. The trial judge, who presumably interpreted the "especially heinous" aggravating factor in

the same manner as he instructed the jury, found the factor to be present. There can be no question that the trial court's erroneous instruction and the prosecutor's argument urged the jury to apply an invalid aggravating factor, and it must be presumed that they did so. The constitutional error is apparent.

"Great risk of death to many persons" aggravating circumstance.

15. In addition to being improperly instructed to consider the unconstitutionally vague and invalid "especially heinous" aggravating factor, Mr. Alvord's jury was also instructed on a second factor that is undisputable inapplicable under Florida law: "D, that the defendant knowingly created a great risk of death to many persons." Florida law could not be clearer on the inapplicability of that factor to the

facts of Mr. Alvord's case. This factor only applies where there is a "likelihood or high probability, and the great risk of death created by the capital felon's actions must be to many persons." Jackson v. State, 599 So. 2d 103 (Fla. 1992); Williams v. State, 574 So.2d 136 (Fla. 1991); Hallman v. State, 560 So. 2d 223 (Fla. 1990); Lusk v. State, 446 So. 2d 1038 (Fla. 1984); Mason v. State, 438 So. 2d 374 (Fla. 1983); Kampf v. State, 371 So. 2d 1007 (Fla. 1979); Elledge v. State, 346 So. 2d 998 (Fla. 1977).

16. In arguing for the applicability of the "great risk to many" aggravator, the prosecutor told Mr. Alvord's jury:

> The next one is D. The defendant knowingly created a great risk of death to many persons. Great risk of death to many persons. (sic) When he broke the door down and entered the residence, armed with a gun, with the rope, with the gloves, with the idea of robbery, burglary, rape, and

> murder, he created a great risk of death to many people. He then, of course, carried that out by strangling each and every one of the [three] occupants in the house.

R 1204.

17. In the absence of a limiting instruction, the jury was left with virtually no guidance other than that provided by the State in its closing argument concerning the application of this aggravating factor. The State argued that the jury could rely on a variety of facts to find the aggravating factor, including, e.g., that Mr. Alvord allegedly "broke the door down," was "armed with a gun, with the rope, with the gloves." Obviously, such a construction would require the application of the "great risk of death to many" aggravator to any crime in which the defendant was "armed with a gun," or "broke the door down" -- hardly

the requisite "narrowing" function required of aggravating factors. Accordingly, the instruction on the "great risk of death to many persons" aggravating factor failed to offer the jury any meaningful guidance, and thus violated the eighth amendment.

Doubling of the great risk of death to many persons" and "the defendant also committed another capital felony" instructions.

18. At the time of Mr. Alvord's trial, in 1974, § 921.141 included an aggravating factor that has since been removed from the statute: "C, that at the time the capital felony was committed the defendant also committed another capital felony." The exact same evidence was used to support this aggravating factor and the factor discussed above: "D, that the defendant knowingly created a great risk of death to many persons." The state's

argument as to each of these factors was virtually the same. As to factor D, as discussed, the state argued, "He then, of course, carried that out by strangling each and every one of the [three] occupants in the house." As to factor C, the state argued, similarly, "that the defendant not only committed one capital felony, not only two felonies but three capital felonies on June 17, 1973." R 1204.

19. It has long been the law of this State that two aggravating factors that are both based on the same facts cannot be separately weighed against the defendant. Provence v. State, 337 So. 2d 783 (Fla. 1976); Thomas v. State, 456 So. 2d 454 (Fla. 1984).

20. These errors violated Mr. Alvord's fundamental constitutional rights. As the Supreme Court made clear in

Espinosa, the Florida penalty phase jury indeed sentences. Espinosa, 112 S.Ct. at 2928. Where the jury sentences, "it is essential that the jurors be properly instructed regarding all facets of the sentencing process." Walton v. Arizona, 497 U.S. 639, 653 (1990). In the instant case, permitting the jury to "double" two aggravating factors based on the same exact facts left the jury free to improperly give separate weight to the "great risk" and "another capital felony" aggravating factors. See Castro v. State, 597 So. 2d 259 (Fla. 1992). The jury's consideration of improper additional aggravating factors invalidates the death sentence. Stringer v. Black, 112 S. Ct. 1130 (1992).

B. THE EIGHTH AMENDMENT ERROR WHICH INFECTED THE JURY'S WEIGHING PROCESS IS NOT HARMLESS BEYOND A REASONABLE DOUBT.

21. The effect of jury weighing of an invalid aggravating factor on the resulting death sentence has been discussed by the United States Supreme Court in a number of cases, notably Espinosa and Stringer v. Black, 112 S. Ct. 1130 (1992). In Stringer, the Court held that relying on such an aggravating factor, particularly in a weighing state, invalidates the death sentence:

> Although our precedents do not require the use of aggravating factors, they have not permitted a state in which aggravating factors are decisive to use factors of vague or imprecise content. A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a

> sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying on the existence of an illusory circumstance. Because the use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty, we cautioned in Zant that there might be a requirement that when the weighing process has been infected with a vague factor the death sentence must be invalidated.

Id. at 1139 (emphasis added).

22. Consideration of an invalid aggravating factor distorts the entire weighing process, adding improper weight to death's side of the scales and depriving the defendant of the right to an individualized sentence:

> [W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale.

Id. at 1137. The jury's "weighing process" in Mr. Robinson's case was "skewed" in the same way that the process was skewed by the invalid aggravator in Espinosa.

23. The Florida Supreme Court did not conduct any review of the effect of the error in the instructions to Mr. Alvord's jury on the "heinous, atrocious, or cruel, "great risk to many,'' or the "another capital felony" aggravating factors. On direct appeal, the court never acknowledged that there was any error in the jury instructions. Alvord v. State, 322 So. 2d 533 at 540. Mr. Alvord's jury was presented with three aggravating factors that were invalid under Espinosa. The State argued with equal furor that these three aggravating factors were applicable and justified a sentence of death. None were emphasized more or less than the other. Any one of the errors

standing alone requires a resentencing in this case before a new jury.

24. The instructional errors in this case were similar, but even more prejudicial to Mr. Alvord, than the error that the Florida Supreme Court held required reversal in James v. State, 18 F.L.W. S139 (Fla., March 4, 1993). In James, the Florida Supreme Court struck the "especially heinous" aggravating factor on direct appeal, leaving four valid aggravating factors and no mitigating factors. The court determined that the trial court's error in finding the aggravating factor was harmless. James v. State, 453 So. 2d 786 (Fla.), cert. denied, 469 U.S. 1098 (1984). When the court considered the effect of the Espinosa error in instructing James' jury

on the invalid aggravating factor, however, it could not say that the error was harmless:

> In closing argument the state attorney argued forcefully that the murder was heinous, atrocious or cruel. On appeal, on the other hand, we held that the facts did not support finding that aggravator. James, 453 So. 2d at 792. Striking that aggravator left four valid ones to be weighed against no mitigators, and we believe that the trial court's consideration of the invalid aggravator was harmless error. We cannot say beyond a reasonable doubt, however, that the invalid instruction did not affect the jury's consideration or that its recommendation would have been the same if the requested expanded instruction had been given.

James, 18 F.L.W. at S139 (second rule 3.850 action) (emphasis added).

25. In the instant case, the Florida Supreme Court left undisturbed the trial court's finding of four valid aggravating factors. Here, as in James, the state

attorney "argued forcefully" that the aggravators applied. Four purportedly valid aggravating factors were left, but in contrast to James, the trial court here found two significant mitigating factors: statutory factors (B), that Mr. Alvord "was under the influence of extreme mental or emotional disturbance," and (G) that Mr. Alvord's "capacity to conform his conduct to the requirements of law was impaired." R 98-99. Thus, since the error was not harmless in James, the error with respect to the especially heinous" aggravating factor alone cannot be harmless here. When the effect of the additional unconstitutional instructions on the "great risk of death to many" and "another capital felony" aggravating factors is considered as well, there can be no question that the multiple jury instruction errors prejudiced Mr. Alvord.

26. This Court cannot assume that the sentence would have been death if "the thumb" of an invalid aggravating circumstance -not to mention two other fingers -- "was removed from death's side of the scale." Stringer, 112 S. Ct. at 1137. This Court cannot find "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24 (1967). Mr. Alvord is entitled to a resentencing.

C. AT THE TIME OF MR. ALVORD'S DIRECT APPEAL THERE WAS NO "REASONABLE BASIS UPON WHICH TO FORMULATE" THE INSTANT CLAIM.

27. In Reed v. Ross, 468 U.S. 1 (1984), the Supreme Court made clear that the failure to preserve an issue at trial or on direct appeal will be excused by

"the novelty of the issue at the time." Id. at 12. The Court held:

> Counsel's failure to raise a claim for which there was no reasonable basis in existing law does not seriously implicate any of the concerns that might otherwise require deference to a State's procedural bar.
>
> . . .
>
> In addition, if we were to hold that the novelty of a constitutional question does not give rise to cause for counsel's failure to raise it, we might actually disrupt state court proceedings by encouraging defense counsel to include any and all remotely plausible constitutional claims that could, some day, gain recognition.

Id. at 15-16. Mr. Alvord's direct appeal was decided in 1975, before Florida's death penalty statute, or indeed any capital statute, had been found to be constitutional by the United States Supreme Court. See e.g., Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida,

428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976). Mr. Alvord's appeal was decided before counsel could reasonably have known that vagueness in capital jury instructions would become an issue of such pervasive focus in the courts. See, e.g.:, Godfrey v. Georgia, 446 U.S. 420 (1980). Even so, his trial and appellate attorneys both raised the issue of the statute's vagueness, if not with the specificity and precision that is now customary. Similarly, Mr. Alvord's direct appeal was decided even before Florida law held that a jury's sentencing recommendation is supposed to be given "great weight" by the trial judge. Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975).

28. It is axiomatic that in capital cases there is a heightened "need for reliability in the determination that death is the appropriate punishment in a

specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Clearly, a death sentence imposed on the basis of the jury's improper consideration of three aggravating factors lacks the requisite "reliability" for such a sentence to be carried out. But for the jury's consideration of these improper factors, only two aggravating factors would properly have been found. When weighed against the mitigating factors present, there is a strong likelihood that Mr. Alvord would not have been sentenced to death. For these reasons, this Court must vacate the sentences of death so imposed.

Respectfully submitted,

SHEPPARD AND WHITE, P.A.

By: /s/ Wm. J. Sheppard
Wm. J. Sheppard, Esq.
Florida Bar No. 109154
215 Washington Street
Jacksonville, Florida 32202
(904) 356-9661
ATTORNEYS FOR DEFENDANT

VERIFICATION

STATE OF FLORIDA)
) ss.
COUNTY OF BRADFORD)

BEFORE ME, the undersigned authority, this day personally appeared GARY ELDON ALVORD, who, being first duly sworn, and says that he is the Defendant in the above-styled cause, that he has read the foregoing, and that he has personal knowledge of the facts and matters therein set forth and alleged; and that each and

all of these facts and matters are true and correct.

/s/ Gary Eldon Alvord
GARY ELDON ALVORD

SWORN TO AND SUBSCRIBED before me by GARY ELDON ALVORD, personally known to me, or identified by _____, this 2d day of June, 1993.

_____
NOTARY PUBLIC
State of Florida at large
My Commission Expires:

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Chris Watson, Assistant State Attorney, 800 East Kennedy, Courthouse Annex, Tampa, FL 33602, by hand delivery this 4th day of June, 1993 and to Candace Sutherland, Assistant Attorney General, 2002 N. Lois

Avenue, Suite 700, Tampa, FL 33607, by U.S. Mail this 4th day of June, 1993.

/s/ Wm. J. Sheppard
ATTORNEY

IN THE CIRCUIT COURT OF THE
THIRTEENTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR
HILLSBOROUGH COUNTY CRIMINAL JUSTICE
DIVISION

STATE OF FLORIDA,

CASE NO. 73-1398

vs.

DIVISION "C"

GARY ELDON ALVORD,

_____/

ORDER DENYING DEFENDANT'S SECOND MOTION FOR POST CONVICTION RELIEF

THIS CAUSE having come before the Court upon Defendant's Second Motion for Post Conviction Relief, as Amended, filed through counsel, and the Court having considered the Motion, the Response to Defendant's Second Amendment to Second Motion for Post Conviction Relief filed by the Office of the Attorney General, oral argument by counsel, and having once granted an evidentiary hearing and said hearing never having occurred due to continuance granted for good cause, the

Court sua sponte ordered a rehearing for oral argument and having heard oral argument by counsel on July 19, 1995, the Court now finds that the issues raised by the Defendant for relief pursuant to Hitchcock v. Dugger, 481 U.S. 393 (1987) and Espinosa v. Florida, 112 S.Ct. 2926, 120 L.Ed.2d 852 (1992), are procedurally barred, and it is hereby,

ORDERED AND ADJUDGED that the Motion as amended is DENIED.

THE DEFENDANT HAS THIRTY (30) DAYS FROM THE DATE OF THIS ORDER TO APPEAL.

DONE AND ORDERED at Tampa, Hillsborough County, Florida, this 28th day of September, 1995.

/s/ Diana M. Allen
DIANA M. ALLEN
CIRCUIT JUDGE

Copies furnished to:
State Attorney's Office - Division C
Office of the Attorney General
William J.Sheppard, Esquire, for
Defendant

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY STATE OF FLORIDA

THE STATE OF FLORIDA

VS CASE NO. 73-1398

GARY ELDON ALVORD, DIVISION "C"
a/k/a PAUL ROBERT BROCK,
a/k/a GARY ELDON VENCZEL

COURT'S FINDINGS OF FACTS
IN SUPPORT OF THE DEATH PENALTY

The Court has carefully considered and reviewed the testimony, evidence and finding of guilt by the jury of Murder in the First Degree. The Court has also considered and reviewed the evidence and testimony submitted by the State of Florida and the Defendant, GARY ELDON ALVORD, a/k/a PAUL ROBERT BROCK, a/k/a GARY ELDON VENCZEL, at the sentencing proceeding and the Jury's recommendation that the death penalty be imposed in this case, and in consideration thereof makes the following findings of fact.

AS TO AGGRAVATING CIRCUMSTANCES:

(A) That the Defendant, GARY ELDON ALVORD, a/k/a PAUL ROBERT BROCK, a/k/a GARY ELDON VENCZEL, murdered GEORGIA TULLY, ANN HERRMANN and LYNN HERRMANN from a premeditated design and while the Defendant, GARY ELDON ALVORD, a/k/a PAUL ROBERT BROCK, a/k/a GARY ELDON VENCZEL, was engaged in the commission of a felony, to-wit: Burglary.

(B) That at the time the capital felony was committed the Defendant, GARY ELDON ALVORD, a/k/a PAUL ROBERT BROCK, a/k/a GARY ELDON VENCZEL, also committed two other capital felonies, to-wit: Murder First Degree.

(C) That the murders of GEORGIA TULLY, ANN HERRMANN and LYNN HERRMANN by the Defendant, GARY ELDON ALVORD, a/k/a PAUL ROBERT BROCK, a/k/a GARY ELDON VENCZEL, were especially heinous,

atrocious and cruel.

(D) That the Defendant, GARY ELDON ALVORD, a/k/a PAUL ROBERT BROCK, a/k/a GARY ELDON VENCZEL, knowingly through his voluntary and intentional acts leading up to and during the course of the commission of the offenses for which he was convicted created a great risk of serious bodily harm and death to many persons.

AS TO MITIGATING CIRCUMSTANCES:

(A) The Defendant, GARY ELDON ALVORD, a/k/a PAUL ROBERT BROCK, a/k/a GARY ELDON VENCZEL, has a significant history of prior criminal activity.

(B) That the capital felonies for which the Defendant. GARY ELDON ALVORD, a/k/a PAUL ROBERT BROCK, a/k/a GARY ELDON VENCZEL was convicted were committed while the Defendant, GARY ELDON

ALVORD, a/k/a PAUL ROBERT BROCK, a/k/a GARY ELDON VENCZEL, was under the influence of extreme mental or emotional disturbance.

(C) That the victims, GEORGIA TULLY, ANN HERRMANN and LYNN HERRMANN were not participants in the Defendant's conduct nor did the victims, GEORGIA TULLY, ANN HERRMANN and LYNN HERRMANN, consent to the act.

(D) That the capital felonies for which the Defendant, GARY ELDON ALVORD,a/k/a PAUL ROBERT BROCK, a/k/a GARY ELDON VENCZEL. was convicted were not committed under circumstances which the Defendant believed to provide a moral justification or extenuation for his conduct.

(E) That the Defendant, GARY ELDON ALVORD, a/k/a PAUL ROBERT BROCK, a/k/a GARY ELDON VENCZEL, was the only

participant in the capital felony for which he has been convicted.

(F) That the Defendant, GARY ELDON ALVORD, a/k/a PAUL ROBERT BROCK, a/k/a GARY ELDON VENCZEL, did not act under duress during the commission of the offense nor was he, during that period of time under the domination of another person.

(G) That at the time of the commission of the offense the Defendant's capacity to appreciate the criminality of his conduct was not impaired, however the Defendant's capacity to conform his conduct to the requirements of law was impaired.

(H) The age of the Defendant, GARY ELDON ALVORD, a/k/a PAUL ROBERT BROCK, a/k/a GARY ELDON VENCZEL, to-wit: age 26 years, has no particular

significance and therefore not a mitigating circumstance.

Therefore, it is the Opinion and Determination of the Court, and the Court so finds that aggravating circumstances do exist, and that these aggravating circumstances far outweigh any circumstances which would mitigate the sentence in this case.

WHEREFORE, the Court finds that the Defendant, GARY ELDON ALVORD, a/k/a PAUL ROBERT BROCK, a/k/a GARY ELDON VENCZEL. by his willful, deliberate, malicious and premeditated act took the lives of GEORGIA TULLY, ANN HERRMANN and LYNN HERRMANN without justification or excuse. The Defendant, GARY ELDON ALVORD, a/k/a PAUL ROBERT BROCK, a/k/a GARY ELDON VENCZEL, knew full well the seriousness and the ultimate consequences of broke and entered the dwelling house of ANN HERRMANN with

the intent to rob and kill the occupants therein. The Defendant, GARY ELDON ALVORD, a/k/a PAUL ROBERT BROCK, a/k/a GARY ELDON VENCZEL, in an extremely heinous, atrocious and cruel manner strangled GEORGIA TULLY, ANN HERRMANN and LYNN HERRMANN to death. The Court finds that based on all the facts and circumstances presented the Defendant, GARY ELDON ALVORD, a/k/a PAUL ROBERT BROCK, a/k/a GARY ELDON VENCZEL, has been and would continue to be a menace to society and therefore must pay the ultimate penalty, death by electrocution, as provided by the laws of the State of Florida.

Dated and Filed in this cause this 9th day of April, 1974, at Tampa, Hillsborough County, Florida.

/s/ Robert W. Rawlings, Jr.
CIRCUIT JUDGE

Supreme Court, U.S.
FILED
APR 6 1998
CLERK

(1)

No. 97-1275

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

GARY ELDON ALVORD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR RESPONDENT

(Capital Case)

QUESTIONS PRESENTED FOR REVIEW

Respondent objects to the petitioner's statement of the questions presented as being predicated upon incorrect factual conclusions and consequently restates the questions as follows:

1. Whether this Court should exercise its discretion to review a state court's denial of a successive collateral appeal based on the application of a state procedural bar where the same grounds, Hitchcock error and the alleged significant non-record mitigating facts, were previously considered and rejected by the Florida Supreme Court's denial of a State Petition for Writ of Habeas Corpus and by this Court's denial of Alvord's Petition for Writ of Certiorari?

2. Whether the decision of the Florida Supreme Court was arbitrary and capricious in failing to order an evidentiary hearing to consider proffered non-record mitigating evidence presented by petitioner where petitioner did not satisfy state procedural rules, after having granted such relief to other death sentenced defendants who were able to satisfy the state procedural rules?

3. Whether a Hitchcock error and the existence of additional non-record mitigating facts is compounded by the sentencing court and jury having considered aggravating circumstances under constitutionally invalid instructions is appropriately before this Court where the jury instruction challenge was neither raised at trial nor presented to the Florida Supreme Court on direct appeal or during any other review before that court?

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No. 97-1275

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

GARY ELDON ALVORD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

OPINION BELOW

The opinion and judgment of the Supreme Court of Florida sought to be reviewed is reported at Alvord v. State of Florida, 694 So. 2d 704 (Fla. 1997), and is reproduced in the appendix to this response (A 1 - A 13). References to the appendix are designated by the letters A through E followed by a page number.

JURISDICTION OF THE SUPREME COURT

The Supreme Court of Florida issued its opinion in this case on April 10, 1997 (A 1 - A 13). Petitioner filed a Motion for Rehearing, which was denied on May 28, 1997. (B 1) Although Petitioner asserted below and asserts here a deprivation of his rights guaranteed by the Constitution of the United States, the questions he raises would not affect the judgment below and therefore this Court does not have jurisdiction. Coleman v. Thompson, 501 U.S. 722, 729 (1991); Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945). The instant petition merely challenges the state court's application of state procedural bars. Even if jurisdiction is deemed to exist under Title 28, United States Code, Section 1257(a) and Rule 10.1(c) of the Rules of the Supreme Court of the United States, this Court should decline to exercise its jurisdiction for the reasons that follow.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. Nor shall any State deprive any person of life, limb or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Florida Rules of Court

RULE 3.850. MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE

(a) Grounds for Motion. A prisoner in custody under sentence of a court established by the laws of Florida claiming the right to be released on the ground that the judgment was entered or that the sentence was imposed in violation of the Constitution or laws of the United States or of the State of Florida, that the court was without jurisdiction to enter the judgment or to impose the sentence, that the sentence was in excess of the maximum authorized by law, that the plea was given involuntarily, or that the judgment or sentence is

otherwise subject to collateral attack may move, in the court that entered the judgment or imposed the sentence to vacate, set aside, or correct the judgment or sentence.

(b) Time Limitations. A motion to vacate a sentence that exceeds the limits provided by law may be filed at any time. No other motion shall be filed or considered pursuant to this rule if filed more than 2 years after the judgment and sentence become final in a noncapital case or more than 1 year after the judgment and sentence become final in a capital case in which a death sentence has been imposed unless it alleges that

(1) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or

(2) the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

(c) Contents of Motion. The motion shall be under oath and include:

(1) the judgment or sentence under attack and the court which rendered the same;

(2) whether there was an appeal from the judgment or sentence and the disposition thereof;

(3) whether a previous postconviction motion has been filed, and if so, how many;

(4) if a previous motion or motions have been filed, the reason or reasons the claim or claims in the present motion were not raised in the former motion or motions;

(5) the nature of the relief sought; and

(6) a brief statement of the facts (and other conditions) relied on in support of the motion.

This rule does not authorize relief based on grounds that could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence.

(d) Procedure; Evidentiary Hearing; Disposition. On filing of a rule 3.850 motion, the clerk shall forward the motion and file to the court. If the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief, the motion shall be denied without a hearing. In those instances when the denial is not predicated on the legal insufficiency of the motion on its face, a copy of that portion of the files and records that conclusively shows that the prisoner is entitled to no relief shall be attached to the order. Unless the motion, files, and records of the case conclusively show that the prisoner is entitled to no relief, the court shall order the state attorney to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate. The answer shall respond to the allegations of the motion. In addition it shall state whether the movant has used any other available state remedies including any other postconviction motion under this rule. The answer shall also state whether an evidentiary hearing was accorded the movant. If the motion has not been denied at a previous stage in the proceedings, the judge, after the answer is filed, shall determine whether an evidentiary hearing is required. If an evidentiary hearing is not required, the judge shall make appropriate disposition of the motion. If an evidentiary hearing is required, the court shall grant a prompt hearing thereon and shall cause notice thereof to be served on the state attorney, determine the issues, and make findings of fact and conclusions

of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, that the sentence imposed was not authorized by law or is otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set aside the judgment and shall discharge or resentence the prisoner, grant a new trial, or correct the sentence as may appear appropriate.

(e) Prisoner's Presence Not Required. A court may entertain and determine the motion without requiring the production of the prisoner at the hearing.

(f) Successive Motions. A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant or the attorney to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

(g) Appeal; Rehearing; Service on Prisoner. An appeal may be taken to the appropriate appellate court from the order entered on the motion as from a final judgment on application for writ of habeas corpus. All orders denying motions for postconviction relief shall include a statement that the movant has the right to appeal within 30 days of the rendition of the order. The prisoner may file a motion for rehearing of any order denying a motion under this rule within 15 days of the date of service of the order. The clerk of the court shall promptly serve on the prisoner a copy of any order denying

> a motion for postconviction relief or denying a motion for rehearing noting thereon the date of service by an appropriate certificate of service.
>
> (h) Habeas Corpus. An application for writ of habeas corpus on behalf of a prisoner who is authorized to apply for relief by motion pursuant to this rule shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court that sentenced the applicant or that the court has denied the applicant relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of the applicant's detention.

STATEMENT OF THE CASE AND FACTS

a) Procedural History

On April 9, 1974, a jury convicted Gary Eldon Alvord of three counts of first degree murder. The jury recommended the death penalty, and the trial court imposed that sentence. This Court affirmed both the conviction and the death sentence in Alvord v. State, 322 So. 2d 533 (Fla. 1975), cert. denied, 428 U.S. 923 (1976). Alvord's first motion for postconviction relief was filed on October 6, 1978. The motion was denied by the trial court and affirmed by the Florida Supreme Court on appeal. Alvord v. State, 396 So. 2d 184 (Fla. 1981).

Alvord then sought relief in federal court by way of

Petition for Writ of Habeas Corpus. Relief was ultimately denied by the Eleventh Circuit in Alvord v. Wainwright, 725 F.2d 1282 (11th Cir.), cert. denied, 469 U.S. 956 (1984). On November 20, 1984, Alvord petitioned the Florida Supreme Court for a Writ of Extraordinary Relief and requested a judicial determination of his competency to be executed separate from the existing procedure under §922.071, Florida Statutes (1983). That petition was denied in Alvord v. State, 459 So. 2d 316 (Fla. 1984).

Subsequent to this Court's decision in Hitchcock v. Dugger, 481 U.S. 393 (1987), Alvord filed a Petition for Writ of Habeas Corpus in the Florida Supreme Court seeking (1) a stay of a mental examination directed by the Governor to determine his competency to be executed and (2) a new sentencing proceeding because neither the trial judge nor the jury considered nonstatutory mitigating circumstances during the sentencing phase. Alvord then filed an amended habeas corpus petition adding a challenge to the admission of Alvord's confession. The Petition for Writ of Habeas Corpus was denied. Alvord v. Dugger, 541 So. 2d 598 (Fla. 1989)(D 1 - D 15). The Florida

Supreme Court specifically found the Hitchcock error to be harmless. A motion for rehearing was denied on May 11, 1989. Alvord then sought certiorari review of the Hitchcock error in this Court. The Petition for Writ of Certiorari was denied on April 16, 1990. Alvord v. Dugger, 494 U.S. 1090 (1990).

Alvord filed His Second Motion for Post Conviction Relief on June 30, 1989 once again asserting the Hitchcock error. On March 9, 1992, the State filed a response to the motion, wherein the State urged that Alvord's Hitchcock claim was procedurally barred. The trial court granted Alvord's request for the opportunity to present evidence in support of his Hitchcock claim on November 6, 1992. After requesting numerous continuances, Alvord then filed his Second Amendment to Second Motion for Post-Conviction Relief, adding a claim under Espinosa v. Florida, 112 S.Ct. 2926, 120 L. Ed. 2d 854 (1992). Alvord then filed another request to continue his evidentiary hearing. The State filed a second response on September 24, 1993, asserting a procedural bar as to the Espinosa claim. Alvord then filed another request to continue his evidentiary hearing. On June 24, 1994, a year and a half after the trial court

granted the request for an evidentiary hearing, the State filed a Motion For Rehearing on Issue of Defendant's Entitlement to Evidentiary Hearing. After hearing oral argument on the issue, the circuit court granted the State's motion and denied the Motion for Post-conviction Relief based on the procedural bars. (C 1 - C 2) On appeal from the denial of his second state motion for post conviction relief, the Florida Supreme Court affirmed the trial court's denial based on the fact that this claim had already been raised and rejected and Alvord had failed to present any newly discovered evidence to excuse the procedural bar. Alvord v. State of Florida, 694 So. 2d 704 (Fla. 1997).

b) Facts

The facts of the instant case were set forth as follows by the Florida Supreme Court in Alvord v. State, 322 So. 2d 533 (Fla. 1975).

> "In the early afternoon of June 18, 1973, the bodies of Georgia, Ann and Lynn were discovered in a home in Tampa, Florida. The home was owned by Ann, who was the daughter of Georgia. Lynn, eighteen years of age, was the daughter of Ann and lived at home with her mother.
>
> Each of the three women was found in a separate room in the house and each had been strangled with a piece of cord. A vaginal test on

> Lynn showed the presence of semen and there was a slight abrasion on the right side of her head. The front door of the house had been kicked open and the condition of the house tended to indicate the murderer burglarized the house either before or after the three women had been murdered. The time of death was tentatively established as occurring between 1:00 a.m., Saturday, June 16, 1973, and 1:30 p.m., Monday, June 18, 1973."

Id. at 533.

Additionally, the Florida Supreme Court noted that there was evidence that the eighteen year old victim Lynn had been raped prior to the murder. Her underwear were found in a room separate from her body, her pubic area was exposed and Alvord had fingernail scratches on his chest. Id. at 538. The Court also noted that the verdict of guilt was supported by evidence that: 1) Alvord had possession of some of Ann's jewelry after the murder; 2) the police found a short piece of rope in a dresser drawer in the defendant's apartment which was the same type of rope used to strangle all three of the victims; 3) one of defendant's shirts had blood on it; 4) on the morning after the murder that the defendant had over a hundred dollars; 5) one of the victim's purses used to store large quantities of money was found empty; and, 6) Alvord confessed to his girlfriend Zelma

Hurley. Zelma Hurley testified that the defendant told her, "I had to rub out three people last night." He identified the victims as Ann, Lynn and Georgia. The defendant then told Zelma the details of the murder. Id. at 539 - 540.

REASONS FOR DENYING THE WRIT

A. Introduction

Petitioner, Alvord has presented three questions for this Court's review. Each of these questions hinge on the state court's resolution of the Hitchcock v. Dugger, 481 U.S. 393 (1987) error. It is respondent's position that these claims do not present a federal question, because denial of all relief by the state courts was based on state procedural rules, rather, than any underlying federal question. The Florida Supreme Court rejected petitioner's claim based on state procedural law which requires the denial of a successive motion where the prior determination was on the merits and the motion fails to allege new or different grounds for relief. Fla. R. Crim Pro. 3.850 (f). The court also reiterated that the Hitchcock error was harmless because much

of the evidence in mitigation outlined in the habeas corpus petition had been presented originally to the judge and jury through the testimony of Dr. Robey who explained much of Alvord's family and mental history. Alvord v. State, 694 So.2d 704 n.1 (Fla 1997)

In Sochor v. Florida, 504 U.S. 527, 112 S.CT. 2114, 119 L.Ed.2d 326 (1992), this Honorable Court reiterated the well established principle of federalism that a state decision resting on an adequate substantive law is immune from review and extended that rule to independent and adequate state procedural grounds. As the opinion below rests on an adequate and independent state ground, this Court lacks jurisdiction to review the instant petition. See Harris v. Reed, 489 U.S. 255, 264, n. 10 (1989); Michigan v. Long, 463 U.S. 1032, 1041 (1983); Herb v. Pitcairn, 324 U.S. 117, 125 - 126 (1945); Foxfilm Corp. v. Muller, 296 U.S. 207, 210 (1935). Accordingly, the petition should be denied.

B. Preclusion of Mitigating Evidence

Petitioner initially asserts that his constitutional rights were violated when the State of Florida, without conducting an

evidentiary hearing, denied his request for a new sentencing proceeding based on Hitchcock error, despite his allegation that significant nonrecord material had never been considered. The real question before this Court, however, is whether this Court should exercise its jurisdiction to review a claim where: 1) the state appellate court's denial in 1997 was based on adequate and independent state grounds, 2) Alvord had previously asserted in 1987 that no state evidentiary hearing was necessary, and 3) the state appellate court had already reviewed the proffered evidence in 1987 and found it to be harmless. Respondent asserts that under the circumstances this Court should decline certiorari review.[1]

Subsequent to this Court's decision in Hitchcock v. Dugger, 481 U.S. 393 (1987), Alvord filed a Petition for Writ of Habeas Corpus in the Florida Supreme Court seeking (1) a stay of a mental examination directed by the Governor to determine his competency to be executed and (2) *a new sentencing proceeding because neither the trial judge nor the jury*

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[1] Alvord's Petition for Writ of Certiorari raising substantially the same claim was subsequently denied by this Court. Alvord v. Dugger, 494 U.S. 1090 (1990)

considered nonstatutory mitigating circumstances during the sentencing phase. Alvord then filed an amended habeas corpus petition adding a challenge to the admission of Alvord's confession. The Petition for Writ of Habeas Corpus was denied. Alvord v. Dugger, 541 So. 2d 598 (Fla. 1989). With regard to the Hitchcock claim the Florida Supreme Court held:

> In Hitchcock, the United States Supreme Court held that, absent harmless error, resentencing was required when the jury was instructed to consider only evidence of statutory mitigating circumstances and the judge failed to consider nonstatutory evidence. Hitchcock v. Dugger, 107 S.Ct. at 1824. At the outset, we note that the state concedes a Hitchcock violation because all participants--the prosecutor, the defense counsel, and the trial judge--explained to the jury that it should limit consideration of mitigating circumstances to those enumerated in the statutes.
>
> We recognize the Hitchcock error and must now determine whether the error was harmless. Hitchcock; Booker v. Dugger, 520 So.2d 246 (Fla.), cert. denied, --- U.S. ----, 108 S.Ct. 2834, 100 L.Ed.2d 935 (1988); Delap v. Dugger, 513 So.2d 659 (Fla.1987). We have previously applied the harmless error analysis to Hitchcock violations, found harmless error, and denied new sentencing proceedings. See, e.g., Clark v. State, 533 So.2d 1144 (Fla.1988); Hall v. Dugger, 531 So.2d 76 (Fla.1988); Jackson v. Dugger, 529 So.2d 1081 (Fla.1988); Smith v. Dugger, 529 So.2d 679 (Fla.1988); Ford v. State, 522 So.2d 345 (Fla.1988), petition for cert.

filed (July 19, 1988); Tafero v. Dugger, 520 So.2d 287 (Fla.1988); Booker; Demps v. Dugger, 514 So.2d 1092 (Fla.1987); Delap. On the other hand, we have found that certain Hitchcock violations did not meet the harmless error test and directed a new sentencing proceeding. See, e.g., Combs v. State, 525 So.2d 853 (Fla.1988); Zeigler v. Dugger, 524 So.2d 419 (Fla.1988); Mikenas v. Dugger, 519 So.2d 601 (Fla.1988); Riley v. Wainwright, 517 So.2d 656 (Fla.1987); Morgan v. State, 515 So.2d 975 (Fla.1987), cert. denied, --- U.S. ----, 108 S.Ct. 2024, 100 L.Ed.2d 610 (1988); Downs v. Dugger, 514 So.2d 1069 (Fla.1987).

In the instant case, the trial judge, in imposing the death sentence, found the following three statutory aggravating circumstances: (1) the murders were committed during the commission of a burglary; (2) the murders were especially heinous, atrocious, or cruel; and (3) Alvord's conduct created a serious risk of death to many persons. The trial judge also found two statutory mitigating circumstances. He concluded that, during the commission of the crime, Alvord was under the influence of extreme mental or emotional disturbance and his capacity to conform his conduct to the requirements of law was impaired.

Alvord now asserts that he was denied the opportunity to present nonstatutory mitigating evidence concerning among other things: (1) his capacity for rehabilitation; (2) the history of mental illness within his family; and (3) his traumatic life experiences while involuntarily committed to mental institutions. The latter two concern Alvord's mental condition which, to a large extent, was presented to both the jury and the judge. We find the mitigating evidence

> clearly insufficient to change the sentencing decision, given the circumstances in this case. Based on the record, we conclude that the Hitchcock error was harmless.

Id. at 598-99

Alvord sought certiorari review of the Hitchcock claim in this Court. The Petition for Writ of Certiorari was denied on April 16, 1990. Alvord v. Dugger, 494 U.S. 1090 (1990). (E1)

Alvord then went back to state court and filed his Second Motion for Post Conviction Relief on June 30, 1989, once again asserting the Hitchcock error and for the first time requesting an evidentiary hearing on the claim. The successive motion was denied as procedurally barred. The Florida Supreme Court affirmed the finding of a procedural bar noting that "*the nonrecord, nonstatutory evidence Alvord has outlined in the motion at issue is very similar to that which [the court] considered in his previously rejected habeas corpus petition.*" Alvord v. State of Florida, 694 So. 2d 704, 705 (Fla. 1997).

In the instant case, the Florida Supreme Court noted that the trial court had rejected petitioner's claim based on the state procedural bar. State procedural law requires the denial of a successive motion that raises claims previously rejected on the

merits absent a showing of new or different grounds for relief. See, Florida Rule of Criminal Procedure 3.850 (f). After reviewing the proffered evidence the Florida Supreme Court determined that because, "the evidence outlined in Alvord's *rule 3.850* motion is not substantially different from that which we considered and rejected as warranting a new penalty proceeding in Alvord VI, we find that the trial court properly denied his motion." Id. 694 So.2d at 707. Under these circumstances, respondent maintains that Petitioner's claim does not present a federal question, but rather seeks review of a claim that was denied as procedurally barred. Ylst v. Nunnemaker, 501 U.S. 797, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991) (state court decision based on procedural bar creates rebuttable presumption that later opinions without reason are based on procedural bar). Accord, Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Accordingly, review should be denied. Wainwright v. Sykes, 433 U.S. 72 (1977).

Furthermore, it is also important to note that despite Alvord's contention that harmless error could not be determined absent an evidentiary hearing, he had previously asserted that

such a hearing was not necessary to resolve the issue. In his state court habeas petition, Alvord asserted, " . . . The same is true for the Hitchcock issue presented here, for it is a 'record issue' (i.e. needs no further evidentiary development) and can be decided as a matter of law." Petition for Extraordinary Relief, For Writ of Habeas Corpus; and Request For Stay of Mental Examination, pg.2, ¶4. Clearly, if counsel had felt that an evidentiary hearing was warranted he should have requested such relief from the court as the Florida Supreme Court has not hesitated to remand for an evidentiary hearing where the need for same was asserted at the outset. Meeks v. Dugger, 576 So. 2d 713 (Fla. 1991). Having failed to obtain his goal of a new sentencing proceeding, it is evident that Alvord's return to state court to request an evidentiary hearing is merely an attempt to circumvent Florida law and get a "second bite at the apple." Rule 3.850, Florida Rules of Criminal Procedure. See, also, Medina v. State, 690 So.2d 1241 (Fla 1997); Francis v. Barton, 581 So.2d 583 (Fla.) cert. denied, 111 S.Ct. 2879 (1991).

Despite petitioner's continued insistence that an evidentiary hearing was required, the Florida Supreme Court's

holding accepted "*the asserted evidence in mitigation as true in reaching this decision,*" Alvord v. State, 694 So. 2d at 707. Nevertheless, after a review of the asserted facts, the court held that the prior harmless error finding was not altered by the facts as presented by Alvord in his successive motion:

> In the habeas corpus petition we addressed in Alvord VI, Alvord contended that he was denied the opportunity to present nonstatutory mitigating evidence concerning, among other things, his capacity for rehabilitation; the history of mental illness within his family; his traumatic life experiences while involuntarily committed to mental institutions; and the fact he was a patient in mental institutions for twelve of the fourteen years preceding the murders in issue while undergoing treatment as a paranoid schizophrenic. In finding the Hitchcock error to be harmless, we first reiterated the statutory aggravating and mitigating circumstances that were properly considered at the penalty phase proceeding and found to exist by the trial judge. Specifically, the trial judge found three aggravating circumstances (committed during the course of a felony, each of the murders was heinous, atrocious, or cruel, and great risk of bodily harm to more than one person), and two mitigating circumstances (at the time of the crime, Alvord was under the influence of extreme mental or emotional disturbance and his capacity to conform his conduct to the requirements of law was impaired). We also noted that much of the evidence in mitigation outlined in the habeas corpus petition had been presented to the judge and jury. Finally, we concluded that the additional evidence in mitigation set forth in the

petition was "clearly insufficient to change the sentencing decision, given the circumstances in this case." Alvord VI, 541 So.2d at 600.

In his latest petition, Alvord argues that the judge and jury should have been allowed to consider that he had escaped from a mental hospital at the time of the crimes, was under an adjudication of insanity and incompetency at the time of the crimes, was schizophrenic, had a history of drug and alcohol abuse, suffered from severe emotional problems as a result of a deprived childhood, has continued incompetency due to his mental problems, has a capacity for rehabilitation, and has artistic talent. This asserted evidence in mitigation is comparable to that which we considered in Alvord VI. Further, much of this evidence is similar to that presented during the penalty phase proceeding or was specifically not presented at trial based on Alvord's refusal to be examined by court-appointed psychiatrists. Given that we previously found the Hitchcock error to be harmless based on very similar evidence, we must again reject Alvord's request for a new penalty phase proceeding. Because we take the asserted evidence in mitigation as true in reaching this decision, we find that an evidentiary hearing would not alter our conclusion. This is especially true given that much of the evidence in mitigation goes to Alvord's mental condition, which was specifically found to be a factor in mitigation.

* * *

In conclusion, because we find that the evidence outlined in Alvord's rule 3.850 motion is not substantially different from that which we considered and rejected as warranting a new

> penalty proceeding in Alvord VI, we find that the trial court properly denied his motion.
>
> Alvord v. State, 694 So.2d 705-707

Thus, an evidentiary hearing, where Alvord may or may not be able to establish the proffered evidence as true, would not result in any established evidence being before the court that has not already been accepted as true by the court. Accordingly, this Court should not only decline to exercise certiorari jurisdiction because the relief was denied on state procedural rules, but, also because on these facts the outcome would remain the same. Coleman v. Thompson, 501 U.S. at 729; Herb v. Pitcairn, 324 U.S. at 125-126 ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion").

Even should this Court find it appropriate to accept jurisdiction to review the facts of a specific case, it is respondent's position that the Florida Supreme Court correctly held that the failure to present the proffered mitigating evidence was harmless beyond a reasonable doubt. The facts introduced at trial show that Alvord was convicted of the 1973 murders of

Georgia, Ann and Lynn. The three women were found murdered in their beds. The home was owned by Ann, who was the daughter of Georgia. Lynn, eighteen years of age, was the daughter of Ann and lived at home with her mother. The front door of the house had been kicked open and the condition of the house tended to indicate the murderer burglarized the house either before or after the three women had been murdered. Each of the three women was found in a separate room in the house and each had been strangled with a piece of cord. Additionally, there was evidence that the eighteen year old victim Lynn had been raped prior to the murder. Her underwear were found in a room separate from her body, her pubic area was exposed, there was semen present, and Alvord had fingernail scratches on his chest. Alvord told his girlfriend Zelma Hurley, "I had to rub out three people last night." He identified the victims as Ann, Lynn and Georgia. The defendant then told Zelma the details of the murder. Alvord v. State, 322 So. 2d at 538.

In imposing the death sentence, the trial court found the following three statutory aggravating circumstances: (1) the murders were committed during the commission of a burglary;

(2) the murders were especially heinous, atrocious, or cruel; and (3) Alvord's conduct created a serious risk of death to many persons. The trial judge also found two statutory mitigating circumstances: (1) Alvord was under the influence of extreme mental or emotional disturbance, and (2) his capacity to conform his conduct to the requirements of law was impaired. [2]

The mitigating evidence now being urged as "new" was clearly insufficient to change the sentencing decision, in light of the foregoing facts and because the essence of all of this mitigating evidence was presented in support of the statutory mitigating circumstances. Alvord is simply applying a different label to that which was already presented to and found by the judge and jury. Accordingly, given the fact that Alvord's mental and family history were considered by both the judge and jury as

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[2] The Florida Supreme Court noted that during the penalty phase proceeding Dr. Robey was called to testify on behalf of the State. Nevertheless, he testified to factors in both aggravation and mitigation. As to statutory mitigation, Dr. Robey testified that Alvord was under extreme stress at the time he committed the murders and that his capacity to conform his conduct to the requirements of the law was impaired. On cross-examination by defense counsel, Dr. Robey was also allowed to testify that Alvord was confined to a series of mental institutions beginning at age thirteen, had escaped from the mental institutions on numerous occasions, was mentally ill, had a personality disorder with schizoid or paranoid features, had been rejected by his mother who was also mentally ill, and had problems starting as early as age seven. Alvord v. State, 694 So.2d 704 n.1 (Fla 1997)

statutory mitigation, the Florida Supreme Court did not err in finding that any failure of the sentencer to consider as nonstatutory mitigating evidence Alvord's capacity for rehabilitation, the history of mental illness within his family and his life experiences while involuntarily committed to mental institutions was harmless.

C. Arbitrary and Capricious Claim

Petitioner's second claim also concerns the Florida Supreme Court's resolution of the Hitchcock claim. Alvord maintains that the Florida Supreme Court made its determinations arbitrarily and capriciously, in violation of the Due Process Clause of the Fourteenth Amendment, in light of its contrary holding in "similar cases," e.g. Hall v. State, 541 So. 2d 1125 (Fla. 1989); Meeks v. Dugger, 576 So. 2d 713 (Fla. 1991). Respondent would submit that those cases Alvord maintains were "similar" are readily distinguishable and, indeed, Hall was distinguished by the Florida Supreme Court upon denial of the instant claim.

In Hall v. Dugger, 531 So. 2d 76 (Fla. 1988)(Hall VI), the Florida Supreme Court, upon review of Hall's Petition for

Writ of Habeas Corpus raising a Hitchcock claim, held that Hall's sentencing jury was improperly instructed but, the error was harmless beyond a reasonable doubt. Subsequently, Hall raised this same claim in a motion for post conviction relief in the trial court. Upon review of the denial of the motion, the court (Hall VII) held that its prior ruling on the Hitchcock claim did not preclude Rule 3.850 review because the motion involved *significant* additional non-record facts which were not considered in the habeas proceeding and because Hitchcock was a significant change in the law. Id. at 1126.

Thus, Hall, unlike Alvord was able to overcome the procedural bar by make the showing required by Rule 3.850(f):

> (f) Successive Motions. A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant or the attorney to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

Furthermore, contrary to Alvord's suggestion, the Florida Supreme Court has limited Hall to such extraordinary circumstances. For example, in Clark v. Dugger, 559 So. 2d 192

(Fla. 1990), Clark asserted the Hitchcock claim in his petition for writ of habeas corpus to the court. In rejecting that claim, the court noted that the claim was procedurally barred because both the state courts and the federal courts had considered Clark's sentencing in light of Hitchcock. The Florida Supreme Court further noted that its decision in Hall VII was not such a change in the law as to require retroactive application and preclude imposition of the procedural bar. Clark at 194.

Under any circumstances the defendant has the burden to establish that an evidentiary hearing is warranted. Under Florida law, a motion for post conviction relief should be denied without an evidentiary hearing when the motion and the record conclusively demonstrates that the movant is entitled to no relief. See Agan v. State, 503 So. 2d 1254 (Fla. 1987); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984). In contrast to Hall, Alvord has not presented substantial nonstatutory mitigating evidence that was withheld from the jury or that was not previously considered by the court when it rejected Alvord's prior Hitchcock claim. Accordingly, the Florida courts' rejection of Alvord's request for an evidentiary hearing does not constitute

a denial of due process, but, rather, is an appropriate application of state procedural laws.

As for the court's resolution of Meeks v. Dugger, as has already been noted in subsection B, Meeks is distinguishable from the instant case because Meeks alleged factual disputes that could only be resolved by an evidentiary hearing. Specifically, the court stated:

> Because of the erroneous jury instruction, the state concedes that the record establishes a Hitchcock violation but maintains the error is harmless. It argues that the record establishes "beyond a reasonable doubt that, after weighing the aggravating factors against the statutory and nonstatutory mitigating factors, the judge would have properly imposed death, regardless of a life recommendation." Demps, 514 So.2d at 1094. We might accept this proposition if we look only at the face of the record. However, according to the affidavits filed with this motion, Meeks' counsel did not seek to develop nonstatutory mitigating evidence because he was constrained by the then-prevailing statutory construction. These affidavits assert that substantial nonstatutory mitigating evidence could have been presented, including the fact that Meeks had been a patient in a state mental hospital, that he had received subsequent treatment with psychotropic medication, that he had a history of drug and alcohol abuse, and that he suffered from severe emotional problems as a result of his deprived childhood. On their face, the contents of these affidavits are sufficient to negate the conclusion that the Hitchcock error was harmless. The

> merits of the claims can only be determined by an evidentiary hearing.
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> Pursuant to our decision in Hall v. State, 541 So.2d 1125 (Fla.1989), Hitchcock claims should now be raised by motion for postconviction relief. However, Meeks' petition for habeas corpus was filed before our decision in Hall. Therefore, we remand this case to the trial court for an evidentiary hearing directed to the Hitchcock allegations of this petition as if they had been filed pursuant to Florida Rule of Criminal Procedure 3.850. The issue to be decided will be whether the Hitchcock error was harmless. In the event the court decides that the error was not harmless beyond a reasonable doubt, the sentences of death should be set aside and new sentencing proceedings conducted before separate juries.

Id. at 716

In contrast, Alvord specifically asserted that no such hearing was necessary. Furthermore, unlike Alvord, at the time Meeks sought review in the Florida Supreme Court, he had not already had the issue resolved on the merits and was attempting to present the claim once again in a successive and procedurally barred motion for post conviction relief.

The decision of the Florida Supreme Court in the instant case was not arbitrary and capricious. There has never been any question that the triple homicide Alvord committed made him

death eligible. As to the particular mitigating evidence that he has proposed the courts have considered the evidence in light of the facts of this case and found it to be harmless. The harmless error finding goes to the selection phase of the sentencing proceeding and is based on the particular facts of this case. This Court has repeatedly declined to review cases to resolve factual disputes and has held that such review is not appropriate.

The appropriate inquiry when a petitioner asserts that the imposition of a death sentence is arbitrary and capricious is not to engage in a case by case comparison of the facts in every reported appellate decision. Rather, this Court has held that the appropriate inquiry is to consider state court formulations to ensure that they are consistent, but not to review state court cases to determine whether they have been applied consistently. Arave v. Creech, 507 U.S. 463, 113 S.Ct. 1534, 123 L.Ed.2d 188, 201 - 202 (1993).

For example, in Buchanan v. Angelone, ___ U.S. ___, 118 S.Ct. 757, ___ L.Ed.2d ___ (1997), this Court recently rejected an argument that Angelone's trial court violated his Eighth and Fourteenth Amendment right to be free from arbitrary

and capricious imposition of the death penalty when it failed to provide the jury with express guidance on the concept of mitigation, and to instruct the jury on particular statutorily defined mitigating factors. This Court explained:

> Petitioner initially recognizes, as he must, that our cases have distinguished between two different aspects of the capital sentencing process, the eligibility phase and the selection phase. Tuilaepa v. California, 512 U.S. 967, 971, 114 S.Ct. 2630, 2634, 129 L.Ed.2d 750 (1994). In the eligibility phase, the jury narrows the class of defendants eligible for the death penalty, often through consideration of aggravating circumstances. Id., at 971, 114 S.Ct., at 2634. In the selection phase, the jury determines whether to impose a death sentence on an eligible defendant. Id., at 972, 114 S.Ct., at 2634- 2635. Petitioner concedes that it is only the selection phase that is at stake in his case. He argues, however, that our decisions indicate that the jury at the selection phase must both have discretion to make an individualized determination and have that discretion limited and channeled. See, e.g., Gregg v. Georgia, 428 U.S. 153, 206-207, 96 S.Ct. 2909, 2940-2941, 49 L.Ed.2d 859 (1976). He further argues that the Eighth Amendment therefore requires the court to instruct the jury on its obligation and authority to consider mitigating evidence, and on particular mitigating factors deemed relevant by the State.
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> No such rule has ever been adopted by this Court. While petitioner appropriately recognizes the distinction between the eligibility and selection phases, he fails to distinguish the differing constitutional treatment we have accorded those

two aspects of capital sentencing. It is in regard to the eligibility phase that we have stressed the need for channeling and limiting the jury's discretion to ensure that the death penalty is a proportionate punishment and therefore not arbitrary or capricious in its imposition. In contrast, in the selection phase, we have emphasized the need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination. Tuilaepa, supra, at 971-973, 114 S.Ct., at 2634-2636; Romano v. Oklahoma, 512 U.S. 1, 6-7, 114 S.Ct. 2004, 2008-2009, 129 L.Ed.2d 1 (1994); McCleskey v. Kemp, 481 U.S. 279, 304-306, 107 S.Ct. 1756, 1773- 1775, 95 L.Ed.2d 262 (1987); Stephens, supra, at 878-879, 103 S.Ct., at 2743-2744.

In the selection phase, our cases have established that the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence. Penry v. Lynaugh, 492 U.S. 302, 317-318, 109 S.Ct. 2934, 2946-2947, 106 L.Ed.2d 256 (1989); Eddings v. Oklahoma, 455 U.S. 104, 113-114, 102 S.Ct. 869, 876-877, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964-2965, 57 L.Ed.2d 973 (1978). However, the State may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence. Johnson v. Texas, 509 U.S. 350, 362, 113 S.Ct. 2658, 2666, 125 L.Ed.2d 290 (1993); Penry, supra, at 326, 109 S.Ct., at 2951; Franklin v. Lynaugh, 487 U.S. 164, 181, 108 S.Ct. 2320, 2331, 101 L.Ed.2d 155 (1988). Our consistent concern has been that restrictions on the jury's sentencing determination not preclude the jury from being able to give effect to mitigating evidence. Thus, in Boyde v. California, 494 U.S. 370, 110 S.Ct.

1190, 108 L.Ed.2d 316 (1990), we held that the standard for determining whether jury instructions satisfy these principles was "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Id., at 380, 110 S.Ct., at 1198; see also Johnson, supra, at 367-368, 113 S.Ct., at 2669.

But we have never gone further and held that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence. And indeed, our decisions suggest that complete jury discretion is constitutionally permissible. See Tuilaepa, supra, at 978-979, 114 S.Ct., at 2638-2639 (noting that at the selection phase, the State is not confined to submitting specific propositional questions to the jury and may indeed allow the jury unbridled discretion); Stephens, supra, at 875, 103 S.Ct., at 2741-2742 (rejecting the argument that a scheme permitting the jury to exercise "unbridled discretion" in determining whether to impose the death penalty after it has found the defendant eligible is unconstitutional, and noting that accepting that argument would require the Court to overrule Gregg, supra).

The jury instruction here did not violate these constitutional principles. The instruction did not foreclose the jury's consideration of any mitigating evidence. By directing the jury to base its decision on "all the evidence," the instruction afforded jurors an opportunity to consider mitigating evidence. The instruction informed the jurors that if they found the aggravating factor proved beyond a reasonable doubt then they "may fix" the penalty at death, but directed that if they believed that all the

> evidence justified a lesser sentence then they "shall" impose a life sentence. The jury was thus allowed to impose a life sentence even if it found the aggravating factor proved. Moreover, in contrast to the Texas special issues scheme in question in Penry, supra, at 326, 109 S.Ct., at 2951, the instructions here did not constrain the manner in which the jury was able to give effect to mitigation.
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> Id. at 761-62

See, also, California v. Ramos, 463 U.S. 992, 999, 103 S.Ct. 3446, 3452, 77 L.Ed.2d 1171 (1983) wherein this Court noted, "In ensuring that the death penalty is not meted out arbitrarily or capriciously, the Court's principal concern has been more with the procedure by which the State imposes the death sentence than with the substantive factors the State lays before the jury as a basis for imposing death, once it has been determined that the defendant falls within the category of persons eligible for the death penalty." Id. at 1008

Alvord was clearly death eligible. The resolution of his Hitchcock claim rests on the particular facts of his case and is not the result of an arbitrary and capricious imposition of the death penalty. As petitioner has failed to show anything more than the appropriate application of prior state precedent and state

procedural rules *to the particular facts of his case*, certiorari review is not warranted.

D. Denial of the Writ

In order for a state court decision to be subject to certiorari review by this Court on the ground that a "federal question" is involved, a petitioner must demonstrate that such a question is "real and substantial." Martin v. Walton, 368 U.S. 25 (1961); Wilner v. Character Committee, 373 U.S. 96 (1963). It is also necessary that a decision thereof would be essential to disposition of the issues presented in the case. Durley v. Mayo, 351 U.S. 277 (1956). This Honorable Court has generally declined to accept jurisdiction of a case from state court on grounds of a "federal question." Mental Hygiene Department v. Kirchner, 380 U.S. 194 (1965); Sanks v. Georgia, 401 U.S. 144 (1970). Certiorari should also be denied where review is sought of a lower court decision which turns solely upon an analysis of the particular facts involved. This Court does not grant a certiorari to review evidence and discuss specific facts. United States v. Johnston, 268 U.S. 220, 227 (1925); See Texas v. Mead, 465 U.S. 1041 (1984) (Stevens, J.). The absence of a

legal controversy of importance or of a direct conflict as to the legal issues will dictate a denial of certiorari in a case which merely the facts are in dispute. This Court has been "consistent in not granting the certiorari except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties." Rice v. Sioux City Cemetery, 349 U.S. 70 (1955).

In the instant application for writ of certiorari, petitioner has not presented a "real and substantial federal question" for review which is dispositive of the cause or of great public importance. Rather, the court's finding that the Hitchcock claim was properly denied because it had previously been denied on the merits and, therefore, was procedurally barred, turns upon the facts of this particular case and was denied based upon state substantive and procedural law.[3] This finding is not violative of

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[3] It is the state's position that no viable claim concerning "unconstitutional aggravating factors" has been raised in the instant petition, just as no Espinosa v. Florida, 505 U.S. 1079 (1992) claim was fairly presented to state courts. (See, pg. 20, fn 3, of the instant petition.) Under Florida law this claim is barred as it was not raised at trial nor on direct appeal. See, Order Denying Second Motion for Post Conviction Relief. (C 1-C 2) Accord, Beltran-Lopez v. State, 626 So. 2d 163, 164 (Fla.), cert. denied, __ U.S. ___, 114 S.Ct. 2122, 128 L.Ed.2d 678 (1995); Henderson v. Dugger, 617 So. 2d 313 (Fla.), cert. denied, 507 U.S. 1047, 113 S.Ct. 1891, 123 L.Ed.2d 507 (1993). See, also, Sochor v. Florida, 504

any constitutional right, does not conflict with any prior precedent of this Court, and is not of great public importance as it turns solely on the facts of this case. Accordingly, the Petition for Writ of Certiorari should be denied.

U.S. 527, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992).

CONCLUSION

As petitioner has failed to show a denial of any constitutional right or conflict with any prior precedent of this Court, the petition should be denied.

Respectfully submitted,

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No. 97-1275

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

GARY ELDON ALVORD,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

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Gary Eldon ALVORD, Appellant,
v.
STATE of Florida, Appellee.

No. 86837.1

Supreme Court of Florida.

April 10, 1997.

Rehearing Denied May 28, 1997.

PER CURIAM.

We have for review the trial court's order summarily denying Gary Eldon Alvord's Florida Rule of Criminal Procedure 3.850 motion for postconviction relief. In his motion, Alvord contended that the judge and jury were improperly prevented from considering evidence in mitigation. We have jurisdiction. Art. V, s 3(b)(1), (7), Fla. Const. For the reasons expressed, we affirm the trial court's order.

In 1974, Alvord was convicted and sentenced to death for three counts of first-degree murder. The facts at trial reflected that he broke into and burglarized a home and killed three women who were in the home. The facts of those murders are set forth in detail in Alvord v. State, 322 So.2d 533 (Fla.1975), cert. denied, 428 U.S. 923, 96 S.Ct. 3234, 49

L.Ed.2d 1226 (1976) (Alvord I).

This case has a long history, which is outlined below to properly reflect the procedural posture of the appeal at issue. In 1978, Alvord filed his initial rule 3.850 motion, the denial of which was affirmed by this Court in Alvord v. State, 396 So.2d 184 (Fla.1981) (Alvord II). Thereafter, he filed a habeas petition in federal district court, which was granted. Alvord v. Wainwright, 564 F.Supp. 459 (M.D.Fla.1983) (Alvord III). That decision was reversed by the Eleventh Circuit Court of Appeals. Alvord v. Wainwright, 725 F.2d 1282 (11th Cir.) (Alvord IV), cert. denied, 469 U.S. 956, 105 S.Ct. 355, 83 L.Ed.2d 291 (1984). Subsequently, the Governor ordered a competency evaluation pursuant to section 922.07, Florida Statutes (1983). Alvord then filed a petition with this Court seeking to be evaluated separate from the procedures set forth in that statute. That petition was denied. Alvord v. State, 459 So.2d 316 (Fla.1984) (Alvord V). After our decision in Alvord V, Alvord was found to be incompetent by psychiatrists appointed by the Governor. The Governor then ordered that a future mental examination be conducted on

September 29, 1987.

On April 22, 1987, the United States Supreme Court issued Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), holding that it is error for a judge to refuse to consider nonstatutory mitigating circumstances and to instruct a jury not to consider such evidence. Prior to the Hitchcock decision, Florida juries and judges had generally considered only statutory mitigating circumstances in death penalty proceedings. Post Hitchcock, this Court acknowledged that the United States Supreme Court's decision constituted a substantial change in the law, which meant that a Hitchcock error could be raised for the first time in a postconviction relief proceeding even if otherwise procedurally barred. Thompson v. Dugger, 515 So.2d 173 (Fla.1987), cert. denied, 485 U.S. 960, 108 S.Ct. 1224, 99 L.Ed.2d 424 (1988); Demps v. Dugger, 514 So.2d 1092 (Fla.1987).

On September 24, 1987, Alvord filed a petition for writ of habeas corpus with this Court seeking a stay of the second mental examination ordered by the Governor, asserting Hitchcock error. On February 9, 1989, this Court denied relief.

Alvord v. Dugger, 541 So.2d 598 (Fla.1989) (Alvord VI), cert. denied, 494 U.S. 1090, 110 S.Ct. 1834, 108 L.Ed.2d 963 (1990). In Alvord VI, this Court acknowledged that Hitchcock error had occurred, but found that error to be harmless.

One month after our decision in Alvord VI, this Court issued Hall v. State, 541 So.2d 1125 (Fla.1989), in which we stated that, to allow for an evidentiary hearing, a Hitchcock claim should be presented to the trial court as a rule 3.850 proceeding rather than as a habeas corpus petition. Thereafter, Alvord filed this rule 3.850 proceeding pursuant to Hall, again seeking relief under Hitchcock. In 1992, the trial court entered an order granting an evidentiary hearing to allow Alvord to present nonstatutory mitigating evidence. Before an evidentiary hearing was held on this issue, Alvord amended his motion to include an additional claim unrelated to this appeal. After considering the amended motion and argument of counsel, the trial court reversed its earlier ruling by denying an evidentiary hearing and finding the Hitchcock claim to be procedurally barred. It is this final ruling that is the subject of this appeal.

Alvord contends that the trial judge erred in denying his rule 3.850 motion without holding an evidentiary hearing. He asserts that the procedural posture of this case is the same as that at issue in Hall and that an evidentiary hearing is necessary to allow him to present nonrecord, nonstatutory evidence that has never been considered by any court. Further, he argues that this Court's decision in Alvord VI, in which we found the Hitchcock error to be harmless, does not preclude consideration of the instant claim because in that case we only considered evidence that was on the record. We disagree with these contentions because we find that the nonrecord, nonstatutory evidence Alvord has outlined in the motion at issue is very similar to that which we considered in his previously rejected habeas corpus petition.

In the habeas corpus petition we addressed in Alvord VI, Alvord contended that he was denied the opportunity to present nonstatutory mitigating evidence concerning, among other things, his capacity for rehabilitation; the history of mental illness within his family; his traumatic life experiences while involuntarily committed to mental institutions; and the

fact he was a patient in mental institutions for twelve of the fourteen years preceding the murders in issue while undergoing treatment as a paranoid schizophrenic. In finding the Hitchcock error to be harmless, we first reiterated the statutory aggravating and mitigating circumstances that were properly considered at the penalty phase proceeding and found to exist by the trial judge. Specifically, the trial judge found three aggravating circumstances (committed during the course of a felony, each of the murders was heinous, atrocious, or cruel, and great risk of bodily harm to more than one person), and two mitigating circumstances (at the time of the crime, Alvord was under the influence of extreme mental or emotional disturbance and his capacity to conform his conduct to the requirements of law was impaired). We also noted that much of the evidence in mitigation outlined in the habeas corpus petition had been presented to the judge and jury.[1] Finally, we

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[1]During the penalty phase proceeding, one witness was called to testify, Dr. Ames Robey. Although Dr. Robey was called to testify on behalf of the State, he testified to factors in both aggravation and mitigation. As to statutory mitigation, Dr. Robey testified that Alvord was under extreme stress at the time he committed the murders and that his capacity to conform his conduct to the requirements of the law was impaired. On cross-examination by defense counsel, Dr. Robey was also allowed to testify that Alvord was confined

concluded that the additional evidence in mitigation set forth in the petition was "clearly insufficient to change the sentencing decision, given the circumstances in this case." Alvord VI, 541 So.2d at 600.

In his latest petition, Alvord argues that the judge and jury should have been allowed to consider that he had escaped from a mental hospital at the time of the crimes, was under an adjudication of insanity and incompetency at the time of the crimes, was schizophrenic, had a history of drug and alcohol abuse, suffered from severe emotional problems as a result of a deprived childhood, has continued incompetency due to his mental problems, has a capacity for rehabilitation, and has artistic talent. This asserted evidence in mitigation is comparable to that which we considered in Alvord VI. Further, much of this evidence is similar to that presented during the penalty phase proceeding or was specifically not presented at trial based on Alvord's refusal to be examined by

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to a series of mental institutions beginning at age thirteen, had escaped from the mental institutions on numerous occasions, was mentally ill, had a personality disorder with schizoid or paranoid features, had been rejected by his mother who was also mentally ill, and had problems starting as early as age seven.

court-appointed psychiatrists.[2] Given that we previously found the Hitchcock error to be harmless based on very similar evidence, we must again reject Alvord's request for a new penalty phase proceeding. Because we take the asserted evidence in mitigation as true in reaching this decision, we find that an evidentiary hearing would not alter our conclusion. This is especially true given that much of the evidence in mitigation goes to Alvord's mental condition, which was specifically found to be a factor in mitigation. Moreover, we do not find that our decision in Hall mandates a contrary conclusion.

We did conclude in Hall that a previous finding of harmless error on a Hitchcock claim raised under a habeas corpus petition did not bar a subsequent review of a Hitchcock claim under a rule 3.850 motion. In so finding, however, we stated that the trial court's express orders in Hall's trial

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[2]In Alvord II, we addressed the issue of whether Alvord's counsel was ineffective for failing to claim insanity as a defense. We rejected that contention, finding that the record was replete with various pre-trial motions filed by defense counsel on this issue but that defense counsel had been precluded from presenting any evidence of insanity because Alvord had refused to communicate in any manner with the two psychiatrists appointed for that purpose.

effectively precluded Hall's counsel from investigating, developing, and presenting possible nonstatutory mitigating circumstances. We additionally concluded that Hall had raised "significant additional nonrecord facts" that were not considered in his habeas corpus proceeding. For instance, in his habeas petition, Hall contended that, had the following nonstatutory evidence been considered, he would have received life: (1) he was not the shooter; (2) he attempted to dissuade his accomplice from beating and killing the victim; (3) he took police to the body; (4) he had used alcohol and drugs; (5) he offered no resistance when arrested; and (6) the evidence against him was weak. We rejected this claim, finding that this evidence was presented to the jury and judge through Hall's testimony; that the evidence was speculative at best; and, when balanced against the evidence in aggravation, that Hall's sentence would have been no different. In his subsequent rule 3.850 motion, Hall claimed that the Hitchcock error prevented his attorney from investigating and discovering evidence in mitigation that would have shown that he suffered from an extreme mental and emotional disturbance, suffered

from organic brain dysfunction, and was illiterate. Unlike the situation at issue, the evidence raised in Hall's rule 3.850 motion was substantially different from that raised in the habeas petition and it was this substantially different evidence that we found warranted a new penalty phase proceeding.

In conclusion, because we find that the evidence outlined in Alvord's rule 3.850 motion is not substantially different from that which we considered and rejected as warranting a new penalty proceeding in Alvord VI, we find that the trial court properly denied his motion.

Accordingly, we affirm the trial court's order summarily denying Alvord's rule 3.850 motion.

It is so ordered.

OVERTON, SHAW, GRIMES, HARDING and WELLS, JJ., concur.

ANSTEAD, J., dissents with an opinion, in which KOGAN, C.J., concurs.

ANSTEAD, Justice, dissenting.

There is no credible basis for distinguishing this case from our holding in Hall v. State, 541 So.2d 1125 (Fla.1989), in which we decided as a matter of policy that Hitchcock claims should be presented under rule 3.850 rather than as habeas corpus petitions to this Court. Importantly, we acknowledged that "[a]ppellate courts are reviewing, not fact-finding, courts." 541 So.2d at 1128. Further, we specifically rejected the trial court's conclusion that our earlier denial of a habeas corpus petition based upon the same grounds barred rule 3.850 relief for Hall:

> We do not agree with the trial court's ruling that our denial of relief in Hall VI, constitutes a procedural bar under the law of the case and res judicata. This case involves significant additional non-record facts which were not considered in Hall VI because that was a habeas corpus proceeding with no further development of evidence beyond the record. In this case, however, we are aided by the trial court's findings of fact at the rule 3.850 hearing. Moreover, as we have stated on several occasions, Hitchcock is a significant change in law, permitting defendants to raise a claim under that case in postconviction proceedings. Cooper v. Dugger, 526 So.2d 900 (Fla.1988); Thompson v. Dugger, 515 So.2d 173 (Fla.1987), cert. denied, 485 U.S. 960, 108 S .Ct. 1224, 99 L.Ed.2d 424 (1988); McCrae v. State, 510 So.2d 874 (Fla.1987); Downs v.

Dugger, 514 So.2d 1069 (Fla.1987).

541 So.2d at 1126. It is interesting to note that the vote in Hall was four to three with the three justices in dissent all expressing the view that no evidentiary hearing was necessary because even taking the proffered mitigation evidence as true, they did not believe it would change the outcome, i.e., the imposition of the death penalty. The position of the dissenters in Hall is remarkably similar to the majority's conclusion here that, "Because we take the asserted evidence in mitigation as true in reaching this decision, we find that an evidentiary hearing would not alter our conclusion." Majority opinion at 706.

We should apply the analysis and holding of the majority in Hall, and not the analysis and holding of the dissenting justices. In failing to do so, we have erred in substituting our opinion for that of a jury who no one can deny should have been allowed to hear the defendant's mitigating evidence. As noted by all of the opinions in this case, we are dealing with a defendant who has a lengthy and undisputed history of serious mental illness, who has even been found

incompetent by a team of State experts appointed by the Governor, contrary to the opinion of Dr. Robey, the State's trial expert whose testimony is extensively relied on in the majority opinion. Under circumstances arguably less compelling, we afforded Hall the benefit of an evidentiary hearing before a trial court. There is no reasonable basis for treating Alvord differently.

KOGAN, C.J., concurs.

SUPREME COURT OF FLORIDA
WEDNESDAY, MAY 28, 1997

GARY ELDON ALVORD,	*	
	*	
Appellant,	*	
	*	CASE NO. 86,837
v.	*	
	*	Circuit Court No. 73-1398
STATE OF FLORIDA,	*	(Hillsborough)
	*	
Appellee.	*	
	*	
* * * * * * * * * * * * *	*	

Appellant's Motion for Rehearing filed in the above cause is hereby denied.

OVERTON, SHAW, GRIMES, HARDING and WELLS, JJ., concur

KOGAN, C.J. and ANSTEAD, J., dissents

TC
cc: Hon. Richard L. Ake, Clerk
Hon. Diana M. Allen, Judge
Mr. William J. Sheppard
Mr. Adam B. Allen
Ms. Elizabeth L. White
Mr. D. Gray Thomas
Ms. Candance Sabella

Sid J. White
Clerk, Supreme Court

IN THE CIRCUIT COURT OF THE THIRTEENTH
JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR
HILLSBOROUGH COUNTY
CRIMINAL JUSTICE DIVISION

STATE OF FLORIDA,

CASE NO. 73-1398

vs.

DIVISION "C"

GARY ELDON ALVORD,

_____/

ORDER DENYING DEFENDANT'S SECOND
MOTION FOR POST CONVICTION RELIEF

THIS CAUSE having come before the Court upon Defendant's Second Motion for Post Conviction Relief, as Amended, filed through counsel, and the Court having considered the Motion, the Response to Defendant's Second Amendment to Second Motion for Post Conviction Relief filed by the Office of the Attorney General, oral argument by counsel, and having once granted an evidentiary hearing and said hearing never having occurred due to continuance granted for good cause, the Court sua sponte ordered a rehearing for oral argument and having heard oral argument by counsel on July 19, 1995, the Court now finds that the issues raised by the Defendant for relief pursuant to Hitchcock v. Dugger, 481 U.S.

393 (1987) and Espinosa v. Florida, 112 S.Ct. 2926, 120 L.Ed.2d 852 (1992), are procedurally barred, and it is hereby,

ORDERED AND ADJUDGED that the Motion as amended is DENIED.

THE DEFENDANT HAS THIRTY (30) DAYS FROM THE DATE OF THIS ORDER TO APPEAL.

DONE AND ORDERED at Tampa, Hillsborough County, Florida, this 28th day of September, 1995.

/S/
DIANA M. ALLEN
CIRCUIT JUDGE

Copies furnished to:

State Attorney's Office - Division C
Office of the Attorney General
William J. Sheppard, Esquire, for Defendant

Gary Eldon ALVORD, Petitioner,
v.
Richard L. DUGGER, etc., et al., Respondents.

No. 71192.

541 So.2d 598, 14 Fla. L. Week. 248

Supreme Court of Florida.

Feb. 9, 1989.

Rehearing Denied May 11, 1989.

PER CURIAM.

Gary Eldon Alvord petitions this Court for a writ of habeas corpus and seeks a vacation of his death sentence and a new trial or, in the alternative, a new sentencing proceeding. We have jurisdiction. Art. V, Sec. 3(b)(1), (9), Fla. Const. We deny relief.

The evidence at trial demonstrated that Alvord entered and burglarized the house of Ann Herrmann. During the burglary, he committed three murders by using a piece of cord and strangling Ann, her mother, Georgia Tully, and her daughter, Lynn Herrmann. Further, a vaginal test on Lynn revealed semen. On April 9, 1974, the jury convicted Alvord of three counts of first-degree murder. The jury recommended

the death penalty, and the trial judge imposed that sentence. This Court affirmed both the conviction and the death sentence in Alvord v. State, 322 So.2d 533 (Fla.1975) [Alvord I], cert. denied, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976).

On November 29, 1976, Alvord filed a motion, pursuant to Florida Rule of Criminal Procedure 3.800, seeking a reduction in his sentence. The trial court denied the motion, and, on review, this Court denied his petition for a writ of mandamus in an unreported order on March 10, 1977 [Alvord II].

On October 6, 1978, Alvord filed a motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850. The trial court denied the motion and this Court affirmed that decision. Alvord v. State, 396 So.2d 184 (Fla.1981) [Alvord III]. Alvord then sought relief in federal court by filing a petition for a writ of habeas corpus. Alvord v. Wainwright, 564 F.Supp. 459 (M.D.Fla.1983). After the district court granted part of the petition with respect to the penalty phase, id. at 490-91, the Eleventh Circuit Court of Appeals reversed and held that both the conviction and the

sentence should be affirmed. Alvord v. Wainwright, 725 F.2d 1282 (11th Cir.), cert. denied, 469 U.S. 956, 105 S.Ct. 355, 83 L.Ed.2d 291 (1984). The failure to allow nonstatutory mitigating circumstances was addressed and rejected in that federal court proceeding. Id. at 1299.

On November 20, 1984, Alvord petitioned this Court for a writ of extraordinary relief and requested a judicial determination of his competency to be executed separate from the existing procedure under section 922.07, Florida Statutes (1983). This Court denied that petition in Alvord v. State, 459 So.2d 316 (Fla.1984) [Alvord IV].

Alvord initially presented the instant habeas corpus petition before this Court seeking (1) a stay of the mental examination directed by the governor to determine his competency to be executed and (2) a new sentencing proceeding because neither the trial judge nor the jury considered nonstatutory mitigating circumstances during the sentencing phase, in violation of the rule set forth by the United States Supreme Court in Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). We denied the

requested stay of the mental examination in an unreported order. Subsequently, Alvord filed an amended habeas corpus petition, adding the ground that we erred in affirming the trial court's admission of his statements when no proper warning of his right to counsel as an indigent was given. Here, he argues that since we subsequently recognized this specific error in Caso v. State, 524 So.2d 422 (Fla.), cert. denied, --- U.S. ----, 109 S.Ct. 178, 102 L.Ed.2d 147 (1988), and expressly receded from our earlier holding in Alvord I, we should now rectify this error and grant a new trial. We granted oral argument on the Hitchcock and confession claims.

Hitchcock Claim

[1] In Hitchcock, the United States Supreme Court held that, absent harmless error, resentencing was required when the jury was instructed to consider only evidence of statutory mitigating circumstances and the judge failed to consider nonstatutory evidence. Hitchcock v. Dugger, 107 S.Ct. at 1824. At the outset, we note that the state concedes a Hitchcock violation because all participants--the prosecutor, the defense counsel, and the trial judge--explained to the jury

that it should limit consideration of mitigating circumstances to those enumerated in the statutes.

We recognize the Hitchcock error and must now determine whether the error was harmless. Hitchcock; Booker v. Dugger, 520 So.2d 246 (Fla.), cert. denied, --- U.S. ----, 108 S.Ct. 2834, 100 L.Ed.2d 935 (1988); Delap v. Dugger, 513 So.2d 659 (Fla.1987). We have previously applied the harmless error analysis to Hitchcock violations, found harmless error, and denied new sentencing proceedings. See, e.g., Clark v. State, 533 So.2d 1144 (Fla.1988); Hall v. Dugger, 531 So.2d 76 (Fla.1988); Jackson v. Dugger, 529 So.2d 1081 (Fla.1988); Smith v. Dugger, 529 So.2d 679 (Fla.1988); Ford v. State, 522 So.2d 345 (Fla.1988), petition for cert. filed (July 19, 1988); Tafero v. Dugger, 520 So.2d 287 (Fla.1988); Booker; Demps v. Dugger, 514 So.2d 1092 (Fla.1987); Delap. On the other hand, we have found that certain Hitchcock violations did not meet the harmless error test and directed a new sentencing proceeding. See, e.g., Combs v. State, 525 So.2d 853 (Fla.1988); Zeigler v. Dugger, 524 So.2d 419 (Fla.1988); Mikenas v. Dugger, 519 So.2d 601

(Fla.1988); Riley v. Wainwright, 517 So.2d 656 (Fla.1987); Morgan v. State, 515 So.2d 975 (Fla.1987), cert. denied, --- U.S. ----, 108 S.Ct. 2024, 100 L.Ed.2d 610 (1988); Downs v. Dugger, 514 So.2d 1069 (Fla.1987).

In the instant case, the trial judge, in imposing the death sentence, found the following three statutory aggravating circumstances: (1) the murders were committed during the commission of a burglary; (2) the murders were especially heinous, atrocious, or cruel; and (3) Alvord's conduct created a serious risk of death to many persons. The trial judge also found two statutory mitigating circumstances. He concluded that, during the commission of the crime, Alvord was under the influence of extreme mental or emotional disturbance and his capacity to conform his conduct to the requirements of law was impaired.

Alvord now asserts that he was denied the opportunity to present nonstatutory mitigating evidence concerning among other things: (1) his capacity for rehabilitation; (2) the history of mental illness within his family; and (3) his traumatic life experiences while involuntarily committed to mental

institutions. The latter two concern Alvord's mental condition which, to a large extent, was presented to both the jury and the judge. We find the mitigating evidence clearly insufficient to change the sentencing decision, given the circumstances in this case. Based on the record, we conclude that the Hitchcock error was harmless.

Confession Error

[2] The record establishes that the trial court admitted Alvord's statements despite the investigating detective's improper Miranda warnings. Following the arrest, the detective read Alvord his rights but failed to explain that he had a right to appointed counsel if indigent. In Alvord I, we held that this failure to give the correct Miranda warnings did not preclude the evidence from being admitted. Alvord v. State, 322 So.2d 533 (Fla.1975), cert. denied, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976). However, in Caso v. State, we receded from that holding in Alvord and stated: "We therefore recede from that portion of Alvord which holds that the trial court did not err in admitting the custodial statements of the defendant." 524 So.2d at 425.

Recognizing that the admission of these statements was error, the question we must now address is whether this error was also harmless. During trial, the state presented testimony of numerous witnesses linking Alvord to the three murders. The principal part of the state's case was not Alvord's custodial statements but the testimony of his girlfriend, Zelma Hurley. She recounted a conversation she had with Alvord the morning following the murders. She testified that Alvord told her that he went over to Ann's house the previous night to "rub out" the victims; he entered the house after kicking the door in; he placed Ann, Lynn, and Georgia in separate rooms and strangled them; he did not want to strangle the older woman but did so to avoid witnesses; and he left the home with money. The importance of her testimony was reflected in Alvord's brief on direct appeal where he stated: "The evidence on which the state primarily built its case was the testimony of Zelma Hurley. All of the remaining testimony put on by the state was subordinate in importance to Zelma Hurley's testimony." Appellant's Opening Brief at 9, Alvord v. State, 322 So.2d 533 (Fla.1975). In that brief, Alvord also stated:

The evidence tending to connect the Defendant with the murders consisted of the following:

First. While the State maintained that the murders were committed during the course of a burglary of Ann Herrmann's home, the State also offered evidence tending to show that the Defendant had harbored a dislike for Ann Herrmann before the date of the murders. Zelma Hurley testified that the Defendant had stated to her quite a few times that he disliked Ann Herrmann, and Jeanine Brautigan testified that about a month before the murders were committed the Defendant told her he could or would choke Ann Herrmann.

Second. The State introduced evidence tending to show that the Defendant had some of Ann Herrmann's jewelry in his possession after the date of the murders. Robert Bernstein who had dated Ann Herrmann for about 8 months, testified that he had given Ann Herrmann a blue, electric cigarette lighter with gold trim which was approximately 1 ½" to 2" high. George Valahakis, Ann Herrmann's ex-husband then testified that he had given Ann Herrmann a wedding ring and an engagement ring. The wedding ring contained a pear shaped diamond, and the engagement ring consisted of a diamond in the center surrounded by smaller diamonds. Mr. Valahakis also testified that he had given Ann Herrmann a Bulova, lady's watch, white-gold in color , with diamonds on each side of the watch where the band joined the watch. The band was also white-gold in color and it was an expandable type band.

The watch, the rings, and the lighter

> were never recovered and were not introduced in evidence at the trial. The State did, however, present testimony that the Defendant had similar appearing jewelry in his possession shortly after the murders were committed. Zelma Hurley testified that the Defendant had a gold and purple cigarette lighter, a pear shaped diamond ring, a ring with diamonds set in it in a flowered design, and a woman's watch with a small face and a stretch band in his possession on their trip to Pennsylvania shortly after the murders had been committed. Terri Williams who had seen the Defendant in Detroit, Michigan on June 25, 1973, testified that the Defendant had in his possession at that time a small woman's diamond watch with a stretch band.
>
> Third. The State introduced evidence tending to show that some physical evidence matching that found at the scene of the murders was later found in the apartment shared by the defendant and Zelma Hurley.
>
> The police found a short piece of rope in the apartment which was the same type of rope used to strangle the women, and a shirt which Zelma Hurley stated belonged to the Defendant was found in the apartment. The shirt had a small quantity of blood on it, but laboratory analysis could not identify it as to type or even identify it as human blood.

Id. at 7-9. We find that these circumstances distinguish the instant case from Caso because in Caso the inadmissible testimony was the only real evidence linking the defendant to

the murder. In this instance, Alvord's statements were clearly not the focus of this trial but were cumulative to the primary evidence presented by his girlfriend. In our view, the admission of the statements constituted harmless error.

After examining the record carefully, we find that there is no reasonable possibility that the Hitchcock error or the erroneously-admitted testimony contributed to the jury's verdict. See State v. DiGuilio, 491 So.2d 1129 (Fla.1986). Consequently, the errors, both individually and collectively, were harmless. For the foregoing reasons, we deny relief and the stay entered in this case is vacated.

It is so ordered.

EHRLICH, C.J., and OVERTON, McDONALD and SHAW, JJ., concur.

GRIMES, J., concurs with an opinion, in which EHRLICH, C.J., and McDONALD, J., concur.

KOGAN, J., dissents with an opinion, in which BARKETT, J., concurs.

GRIMES, Justice, concurring.

While I agree that the admission of Alvord's statements can be considered as harmless error, I also believe that this Court's ruling in Caso v. State, 524 So.2d 422 (Fla.), cert. denied, --- U.S. ----, 109 S.Ct. 178, 102 L.Ed.2d 147 (1988), should not be given retroactive effect even in this case. Caso involved the admissibility of a confession given after a defective Miranda[1] warning. Yet, the United States Supreme Court refused to give the Miranda decision itself retroactive application on the premise that a violation of the Miranda rule was less likely to affect the reliability of a confession than one induced by coercion. Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882, reh'g denied, 385 U.S. 890, 87 S.Ct. 12, 17 L.Ed.2d 121 (1966). Based on this rationale, both Florida, Nowlin v. State, 346 So.2d 1020 (Fla.1977), and the United States Supreme Court, Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), permit confessions obtained without proper Miranda warnings to be admitted for purposes of impeachment as long as the confessions are

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[1]Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

voluntary. Therefore, it is clear that the admission of Alvord's statements could not be deemed fundamental error.

In Alvord I, this Court interpreted Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974), as authority to hold that Alvord's statements could be admitted even though his Miranda warnings failed to include the advice that an attorney would be appointed to represent him if he were indigent. As a result of the United States Supreme Court's more recent interpretation of Michigan v. Tucker in Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), we found it necessary to recede from that position. However, the point was squarely decided against Alvord in Alvord I and only changed after a later Supreme Court decision demonstrated that we had previously misinterpreted Michigan v. Tucker. As related to any other defendant, this would constitute an evolutionary change in the law within the contemplation of Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980), and I do not think that the principle is any different simply because it is Alvord who now complains.

EHRLICH, C.J., and McDONALD, J., concur.

KOGAN, Justice, dissenting.

I cannot agree that the admission of petitioner's statements in violation of Caso v. State, 524 So.2d 422 (Fla.), cert. denied, --- U.S. ----, 109 S.Ct. 178, 102 L.Ed.2d 147 (1988), is harmless error. The state's case against petitioner rested primarily, and almost exclusively, upon the testimony of Zelma Hurley. Petitioner's statements to the police in Michigan corroborated and gave credibility to the testimony of Ms. Hurley. The state in its closing argument to the jury put great emphasis on this statement and its importance in explaining its theory of the case. This error certainly cannot be classified as harmless.

I also cannot agree that the jury's inability to consider certain nonstatutory mitigating circumstances, such as petitioner having been a patient in mental institutions for twelve of the fourteen years preceding the commission of this crime while undergoing treatment as a paranoid schizophrenic, can be said to be harmless error beyond and to the exclusion of every reasonable doubt. The jury may have returned a

recommendation of life imprisonment had it been permitted to consider this evidence and the trial judge in sentencing the petitioner might have been required to follow this recommendation under Tedder v. State, 322 So.2d 908 (Fla.1975), because the recommendation would have been reasonable.

I would grant the petition and vacate the petitioner's conviction and sentence and remand for the purpose of conducting a new trial as to both guilt and penalty.

BARKETT, J., concurs.

Gary Eldon ALVORD, petitioner,
v.
Richard L. DUGGER, Secretary, Florida Department of Corrections

No. 89-5331

Supreme Court of the United States

April 16, 1990

Petition for writ of certiorari to the Supreme Court of Florida.

Denied.

Justice BRENNAN and Justice MARSHALL dissenting:

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v. Georgia, 428 U.S. 153, 227, 231, 96 S.Ct. 2909, 2950, 2973, 49 L.Ed.2d 859 (1976), we would grant certiorari and vacate the death sentence in this case.

SUPREME COURT, U.S.
FILED
APR. 20
OFFICE OF THE CLERK

No. 97-1275

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

GARY ELDON ALVORD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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April 17, 1998

ARGUMENT

Respondent's arguments in opposition to the Petition for Certiorari are mistaken and misleading. This case presents actual and substantial federal constitutional questions of great importance as to capital sentencings, and the decision below conflicts with clear constitutional standards enunciated by the Court. Review, therefore, is warranted.

1. No adequate independent state law grounds asserted by the court below can be determined to exist unless the substance of petitioner's constitutional claims constitutes an inadequate basis for relief on the merits. The merits of petitioner's federal constitutional claims must be determined in order to ascertain whether the asserted state law procedural bar even applies. The Florida Supreme Court's determination of a procedural bar is error unless petitioner's claims under *Hitchcock v. Dugger,* 481 U.S. 393 (1987), are materially identical to those raised previously. The Petition for Writ for Certiorari, and the dissent below,

demonstrate the substantial differences between the current and previous *Hitchcock* issues.

As a matter of legal platitude, respondent is correct that decisions of state courts resting on adequate and independent state law grounds are not subject to review by the Court for federal constitutional error. However, the invocation by the Florida Supreme Court of a state law procedural bar was based solely upon that court's evaluations of whether the non-record *Hitchcock* evidence proffered by petitioner was essentially the same as the record *Hitchcock* evidence previously considered by the court below. The previous proceeding was an original habeas corpus petition filed in the Florida Supreme Court, which at that time considered only mitigating evidence that was actually in the trial record. *Alvord v. State,* 694 So.2d 704, 705 (Fla. 1997).

Ultimately, this means that no adequate and independent state law ground exists to preclude review by

the Court unless the proffered non-record mitigating evidence is insufficient to overcome the constitutional harmlessness standard found in a 1989 decision on the basis only of evidence in the trial record. *See Alvord v. Dugger*, 541 So.2d 598, 599-600 (1989). In other words, the merits of petitioner's non-record *Hitchcock* claim must be ascertained, and no adequate and independent state law grounds exist to preclude review unless the acknowledged *Hitchcock* error can be found constitutionally harmless in light of the proffered non-record mitigating evidence. As set forth in the petition, no harmlessness finding can be applied in this case.

2. In 1987, petitioner did not request an evidentiary hearing as to error under *Hitchcock v. Dugger*, 481 U.S. 393 (1987), insofar as the Florida procedural vehicle appropriate at that time was an original petition for writ of habeas corpus in the Florida Supreme Court (which conducts no evidentiary hearings) until that court's

subsequent decision in *Hall v. State,* 541 So.,2d 1125 (Fla. 1989), which directed future applicants to proceed otherwise. Respondent raises a straw issue regarding petitioner's 1987 petition in the Florida Supreme Court. Brief in Opposition at 14. That original petition was filed promptly after this Court's decision in *Hitchcock, supra.* At that time, an original petition for habeas corpus in the Florida Supreme Court was an appropriate vehicle for the challenge raised. The Florida Supreme Court denied habeas corpus relief on February 9,1989. *Alvord v. Dugger,* 541 So.2d 598 (Fla. 1989).

Subsequently, that court decided in *Hall v. State,* 541 So.2d 1125, 1128 (1989), that *Hitchcock* claims raised after *Hall* would not be considered on original habeas petitions to that court, but rather must be presented to trial courts on motions for post-conviction relief under Fla.R.Crim.P. 3.850. Alvord's original habeas petition in the court below in 1987 could not request an evidentiary

hearing because such hearings are not among the functions of that court. *See, e.g., Hall,* 541 So.2d at 1128. Petitioner therefore cannot be faulted for following Florida procedural law in effect at the time of his 1987 original habeas corpus petition in the Florida Supreme Court and contending at that time that the decision in *Hitchcock,* as a matter of law, simply invalidated death sentences imposed under the unconstitutional strictures of Florida law at the time of petitioner's trial in 1974. Respondent's contentions to the contrary are simply disingenuous.

3. Respondent ignores that both Florida law at the time of petitioner's 1974 trial, and the instructions actually given to the jury during the penalty phase in petitioner's trial, affirmatively foreclosed consideration of non-statutory mitigating evidence by both the advisory jury and the sentencing judge. One of the primary authorities upon which respondent relies clearly demonstrates the appropriateness of review in this case, as well as the

constitutional error by the court below. *See* Brief in Opposition at 30-34. In *Buchanan v. Angelone*, 522 U.S. ___, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998), while distinguishing between the eligibility phase and selection phase of a capital sentencing proceeding, the Court restated the established selection-phase rule that the states cannot constitutionally preclude the capital sentencer from considering any relevant mitigating evidence. *Id.* at ___, 118 S.Ct. at ___, 139 L.Ed.2d at 109-10.

As a matter of Florida law at the time of petitioner's 1974 trial, § 921.141, Fla. Stat. (1973), and under the instructions actually given to the advisory jury in this case, (Tr. 992-93, Pet. App. 380a-382a), the capital sentencer was affirmatively precluded from considering in any manner any mitigating evidence directed to factors other than those specifically enumerated in Florida law. The trial court, the jury, the prosecution and the defense at that time complied with that unconstitutional restriction,

precluding nonstatutory mitigation. As a result, the standards enunciated in *Buchanan* require that petitioner's sentence of death be vacated, and so review on certiorari is warranted in this case.

4. Substantial federal questions of public importance exist in determining the effect of undisputed *Hitchcock* error in cases tried under a clearly unconstitutional regime prior to the court's decisions in *Hitchcock, supra; Skipper v. South Carolina,* 476 U.S. 1 (1986); *Eddings v. Oklahoma,* 455 U.S. 104 (1982); and *Lockett v. Ohio,* 438 U.S. 586 (1978). Additionally, certiorari is appropriate in a capital case even where the Court must consider the facts of the case in order to discern its important constitutional merits. *See Kyles v. Whitley,* 514 U.S. ___, ___, 115 S.Ct. 1555, ___, 131 L.Ed.2d 490, 519 (1995) (Stevens, J., concurring).

As respondent concedes, Brief in Opposition at 12, the matters raised in the petition in this case turn on

the existence of admitted *Hitchcock* error in petitioner's trial. The issues raised in the petition in this case constitute federal questions of continuing substantial importance in capital cases, warranting review by the Court. Denial of certiorari is not warranted merely because resolution of such a substantial and important federal question involves consideration of the factual circumstances of an individual case. *See, e.g., Kyles, supra.* Review in this case is warranted on the basis of the real, substantial and important federal constitutional questions presented, and the erroneous constitutional construction below.

The existence of substantial federal questions resolved below contrary to the clear constitutional standards enunciated by this Court for application to capital sentencing proceedings clearly warrants review on certiorari. Accordingly, the petition for writ of certiorari should be granted.

Respectfully submitted,

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